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No. 981183

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1998

Anderson Community School Corporation,
Petitioner,

v.

James Randall Willis, II, by his next friend
and father, James Randall Willis,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Can Anderson Community School Corporation administer drug tests to high school students who violate certain published rules, if professional literature and statistical data suggests that these violations bear a causal nexus to drug and alcohol use, consistent with the Fourth Amendment to the United States Constitution?

LIST OF PARTIES

Petitioner is Anderson Community School Corporation and Respondents are James Randall Willis, II, by his next friend and father, James Randall Willis.

Petitioner has no parent companies, subsidiaries, or affiliates.

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PETITION FOR A WRIT OF CERTIORARI

The Anderson Community School Corporation respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit as Amended on Denial of Rehearing and Suggestion for Rehearing *En Banc* (App. A, *infra*, 1a-24a) is reported at 158 F.3d 415 (7th Cir. 1998). The initial opinion of the Court of Appeals is reported at 1998 WL 569114 (7th Cir. Ind.). The opinion of the United States District Court, Southern District of Indiana, (App. B, *infra*, 25a-55a) is unreported.

JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit Court was filed on September 9, 1998. Petitioner's timely petition for rehearing and suggestion for rehearing *en banc* was denied on October 28, 1998. (App. A, *infra*, 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Constitution, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and

> no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

U.S. Constitution, Amendment XIV:

> ". . . [n]or shall any state deprive any person of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

In order to counteract growing disciplinary problems related to illegal drug and alcohol use, Petitioner, Anderson Community School Corporation ("Corporation"), established a policy allowing it to conduct urinalysis drug and alcohol testing of high school students who violate certain published rules which professional literature and statistical data suggest bear a causal nexus to such drug and alcohol use. Under the policy, a student suspended for fighting must submit to a drug and alcohol test.

Respondent, James Randall Willis II ("Willis"), a high school freshman, by his next friend and father James Randall Willis, objected to the Corporation's policy after being suspended for fighting and asked to submit a urine sample upon his return to school. Willis, represented by counsel to the Indiana Civil Liberties Union, filed an action, pursuant to 42 U.S.C. §1983, claiming that the policy violated the Fourth Amendment guarantee against unreasonable searches and the Indiana Constitution. The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1367.

1. Facts Relevant to the Petition

In 1996, the Corporation's officials from the Corporation's two high schools, Anderson High School and Highland High School, met to discuss growing disciplinary problems and their perception of increased drug and alcohol use among students. In an effort to address the problem, the Corporation organized an *adhoc* committee of parents, community leaders and school officials. The committee reviewed other schools' drug and alcohol testing policies, surveys, professional text and data that discussed a causal nexus between drug and alcohol abuse and disciplinary problems in schools, and actual test results from a drug and alcohol policy of the Carmel Clay Schools in Carmel, Indiana which required drug and alcohol testing for violating published school rules.

The materials suggested a causal nexus between certain disruptive student behavior, such as fighting, and drug and alcohol use. One such text states:

> A great amount of research has been generated on the topic of adolescence substance abuse. Within the body of this research, there is a general consensus that there are certain behaviors which can help identify those adolescents who are using alcohol or other drugs on a regular basis. Those behaviors include . . . truancy and tardiness, verbal and physical abuse toward staff and classmates, vandalism, absenteeism, and a sudden drop in grades. Those behaviors are not conclusive on their own that the student is using drugs, but they are indicators that point to that possibility.

(App. B, 26a-27a). Other text reviewed by the committee showed: (1) drug users are more than twice as likely to get in physical fights than non-users; (2) "[a]lthough many of the following behaviors are to some extent normal in many adolescents at certain times, frequency of and occurrence and clustering of . . . behaviors [such as "developing a short tempter" and "exhibiting abusive behavior"] are indicative of possible substance abuse and should be investigated. . . ."; and, (3) "[d]estructive school behavior such as . . . violence . . . correlated with student use of alcohol and other drug use . . . [such that] users are . . . more than twice as likely to get into physical fights . . . ." (App. B, 27a). Additionally, the professional text entitled "Facing Chemical Dependency in the Classroom" provides:

> Toxicity from intoxicating mood-altering chemicals remains in the system for several days and irritates the brain cells. A toxic student's central nervous system cannot manage itself nor can anyone else manage the moods of a toxic brain. Student unmanageability may take the forms of overt acting out, disrespect, violence, abuse, or truancy or it may take a more passive form such as drowsiness, apathy, isolation, unfinished assignments, or disrespect.
>
> * * *
>
> Toxic brains also tend to be disruptive and if a teacher spends five minutes per 50 minutes of a classroom period managing the unmanageable kids, the amount of education that can possibly take place has been decreased by 10 percent. That means that the other kids will learn 10 percent less material that day, that month, that year and this decline will be reflected in standardized test scores.

(App. E, *infra*, 63a).

The committee also reviewed the results from Carmel Clay Schools' drug and alcohol testing, which was conducted between January and June 1997. The Carmel High School results showed that forty (40%) percent of the students tested after fighting tested positive for illegal substances. Based upon the materials reviewed, the committee recognized a drug and alcohol use problem in their schools, especially considering the number of disciplinary referrals and the types of disciplinary problems, including disruptive behaviors in the classroom such as fighting. The committee eventually formulated a testing policy premised upon intervention, which was adopted by the school board in August 1997.[1]

In addition to testing based upon individualized suspicion of drug or alcohol use,[2] the policy requires students who fight or commit a disciplinary infraction resulting in suspension from school for three (3) days or more to submit to testing upon returning to school from their suspension. The purpose of the policy is to help identify and intervene with those students who are using drugs as soon as possible and to involve the parents immediately. Students who test positive are required to participate in a drug education program. The policy expressly provides that the results are

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[1] At the August 5, 1997 board meeting of the Corporation, Willis' father, Plaintiff James Randall Willis, was the only person to speak out against the drug testing policy.

[2] A finding of individualized suspicion of drug or alcohol use is based upon a school official's physical observations of a student at the time of suspension, such as visibly impaired motor skills, or the aroma of drugs or alcohol on or around the student.

for parental use only and will not result in any additional punishment by school officials. Upon a positive test result, the result is disclosed only to parents and a designated school official. Refusal to submit to the test is considered an admission of being under the influence of alcohol or other drugs, which is a violation of school rules and is dealt with according to the student discipline policy.

The Corporation's drug and alcohol testing policy has had measured results. Despite publication of the drug and alcohol testing policy to students, test results from the Corporation's policy for the fall semester of 1997-98 academic year (August to December 1997) reflected a correlation between disciplinary problems and drug and alcohol use. (App. B, 28a). During the semester, forty-six percent (46%) of all Highland High School students tested under the policy tested positive for an illegal substance and thirty percent (30%) of all expulsions from Highland High School were drug related. During the same period, twenty five percent (25%) of all Anderson High School students tested under the policy tested positive for an illegal substance. More important, forty percent (40%) of all students at Highland High School who were tested under the policy for fighting tested positive for an illegal substance; for Anderson High School students, the percentage was eighteen (18%). The record does not contain information about Highland High School freshmen who were suspended for fighting, but six percent (6%) of all Highland freshmen screened under the policy tested positive. At Anderson High School, twenty-seven percent (27%) of all freshmen tested positive, but of the four (4) freshmen who were suspended for fighting, none tested positive.

In December 1997, Willis verbally abused a fellow student, threw an object at the student, and then punched him

four to five (4 - 5) times. Following the fight, Willis and the other student were taken to the Dean of Freshman, Philip Nikirk. Dean Nikirk did not observe anything physically obvious about Willis' appearance *at the time* that gave him reasonable suspicion that Willis was impaired or under the influence of drugs or alcohol, other than his involvement in the disruptive behavior. Willis was suspended for fighting for five (5) days. When Willis returned to school following his suspension, he was requested to submit to a drug test because he had been suspended for fighting. Willis refused and as a consequence of his of his refusal, Willis was suspended from school for one week. He was also advised that if he refused to take the drug test after his one week suspension, he would be suspended again pending expulsion proceedings because his refusal would be deemed an admission of unlawful drug use.

2. Trial Court Proceedings

The District Court conducted a hearing, accepted additional evidence and then entered an order denying Willis' Motion for a Preliminary Injunction. (App. C, *infra*, 56a-58a). The order serves as the basis for the District Court's final judgment. (App. D, *infra*, 59a-61a). The District Court held that the Corporation's drug testing policy as applied to Willis was reasonable under all of the circumstances (App. B, 33a), and was constitutional under the two part test for suspicion-based searches enunciated in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (App. B, 40a), and the special needs analysis enunciated in *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (App. B, 53a-54a).

The District Court also found the following relevant facts: (1) the search at issue was not based on the normal need for law enforcement or crime detection; (2) no law

enforcement officials were involved in the testing, and the results were not used punitively; (3) as a public school student, Willis had a reduced privacy interest, and the nature of his privacy rights was only that which was appropriate for public school children; (4) the fact that Willis was not a student athlete, who had an even lower expectation of privacy, was of no consequence; (5) Willis' privacy interests lessened in a school setting; (6) the intrusiveness of the search was quite minimal and Willis never objected to the process by which the drug test was conducted; (7) there was no evidence that the drug screen was used for anything other than for drugs or alcohol detection; (8) the test was standard and did not vary depending on the identity of the student; (9) only positive test results were disclosed, and those were disclosed to only a limited number of people on a need-to-know basis to help students get treatment and not for punishment; (10) Willis knew the terms of the Corporation's drug testing policy before he engaged in his violent and disruptive behavior; (11) Willis chose to engage in misconduct that he knew would subject him to a drug test; and, (12) the Corporation's interest in deterring drug use and protecting the health of its students was important, if not compelling.

Notwithstanding the fact that Dean Nikirk did not observe anything which gave him reasonable suspicion that Willis was impaired or under the influence of drugs or alcohol following the fight, the District Court held that, given the information correlating disruptive behavior, such as fighting, with illegal drug and alcohol use, Willis' disruptive behavior itself created individualized reasonable suspicion for school officials that he had been using illegal drugs or alcohol so as to require his submission to the drug test. (App. B, 38a-39a). As an additional basis for finding that the policy was constitutional, the District Court held that the search was reasonable given the minimal intrusion on Willis' privacy

interests as balanced against the special needs of the Corporation in furtherance of its responsibilities as guardian and tutor and to protect the health of its students. (App. B, 53a-54a).

3. The Ruling of the Court of Appeals for the Seventh Circuit

The Seventh Circuit reversed the judgment of the District Court and held that the Corporation's drug and alcohol testing policy violated the Fourth Amendment. (App. A, 5a-6a). The Seventh Circuit was troubled with Dean Nikirk's testimony that he did not observe anything after the fight that made him think that Willis was impaired or under the influence of drugs or alcohol. Despite the Corporation's argument that the Dean's physical observations after the fight were not dispositive of whether Willis had used drugs or alcohol[3] and the Seventh Circuit's recognition that a prudent person could reasonably conclude that the Corporation's own statistics suggested some relationship between the use of

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[3] The Corporation argued that the professional texts and statistical data established a causal nexus between fighting and drug and alcohol use so that Willis' actions in verbally abusing, throwing an object at, and engaging in a fight with another student created in him the individualized suspicion of drug or alcohol use at the time. Additionally, as noted in the professional text Facing Chemical Dependency in the Classroom: "Toxicity from intoxicating mood-altering chemicals remains in the system for several days and irritates the brain cells. A toxic student's central nervous system cannot manage itself nor can anyone else manage the moods of a toxic brain. Student unmanageability may take the forms of overt acting out, disrespect, violence, abuse, or truancy or it may take a more passive form such as drowsiness, apathy, isolation, unfinished assignments, or disrespect." *(See* App. E, *infra*, 63a).

the Corporation's data was not strong enough to conclusively establish the Corporation's presumption of reasonable suspicion of substance abuse when a student is suspended for fighting. (App. A, 11a-12a).

Additionally, although the Seventh Circuit agreed that a special needs analysis was appropriate because the Corporation's concerns were other than crime detection; i.e., deterring drug use, disciplining its students, and protecting the health of the children, it held that the Corporation's policy did not satisfy the special needs requirements of a suspicionless search as recognized in *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995). (App. A, 24a). This Court held in *Vernonia* that a court is required to balance the nature of the individual's privacy interest and the character of the intrusion against the nature and immediacy of the government's concerns, as well as the efficacy of the means for meeting those concerns, to determine whether the intrusion was reasonable under the Fourth Amendment.

In distinguishing *Vernonia*, the Seventh Circuit held that the nature of the Willis' privacy interest was different than the student athletes in *Vernonia* because Willis' actions in fighting, even in light of the published school rules, was different than students volunteering to participate in athletics. The Seventh Circuit did not address the character of the intrusion,[4] but held that the nature and immediacy of the government's concerns were not "meaningfully less than that

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[4] This Court has held that the character of the intrusion of a urinalysis for drug use on a public high school student is negligible. *Vernonia*, 515 U.S. at 658.

in *Vernonia*."[5] Finally, the Seventh Circuit held that the efficacy of the means for the government to meet those concerns was in sharp contrast to that in *Vernonia* since a dean of students was to meet with each student before suspensions were imposed. The Seventh Circuit held "under the *Vernonia* formulation, courts consider the feasibility of a suspicion-based search when assessing the efficacy of the government's policy," and stated:

> As a practical matter, it may be that when a suspicion-based search is workable, the needs of the government will never be strong enough to outweigh the privacy interests of the individual. Or, stated slightly differently, perhaps if a suspicion-based search is feasible, the government will have failed to show a special need that is "important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion."

(App. A, 15a). The Seventh Circuit also stated that "it is hard to imagine a scenario in which the Corporation's school officials are better-situated to make a determination of individualized suspicion than in the wake of student misconduct that warrants a three-day suspension." (App. A, 21a-22a). Because the Seventh Circuit believed that a suspicion-based system could easily address the Corporation's concerns, it struck down the policy.

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[5] This Court described the nature of the government's interest in deterring drug use by our Nation's schoolchildren as compelling. *Vernonia*, 515 U.S. at 661.

REASONS FOR GRANTING THE PETITION

The Seventh Circuit's opinion that the Corporation's special needs, in furtherance of its responsibilities under a public school system as guardian and tutor of children entrusted to its care, do not outweigh Willis' privacy interest and justify the search, conflicts in principle with this Court's decision in *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995). Additionally, the Seventh Circuit's opinion on whether reasonable suspicion exists to justify the search conflicts in principle with this Court's decision in *New Jersey v. T.L.O.*, 469 U.S. 345 (1985). The decision below is erroneous and the issues raised are important to all public school officials and personnel, parents, and students who hope to restore education in their classrooms in light of increasing disruptive student behaviors that bear a causal nexus to drug and alcohol use, and this is a timely opportunity for this Court to provide guidance to courts below.

1. The Seventh Circuit's Special Needs Analysis Conflicts in Principle with this Court's Decision in *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

The Seventh Circuit's special needs analysis conflicts in principle with *Vernonia* because it ignores the efficacy of the Corporation's means for deterring drug use among students and it gives greater weight to Willis' privacy interest than afforded in *Vernonia*. In *Vernonia*, this Court used a balancing test to determine whether a urinalysis drug test of high school students was reasonable under the Fourth Amendment; a court is required to balance the nature of the individual's privacy interest and the character of the intrusion against the nature and immediacy of the government's concerns as well as the efficacy of the means for meeting

those concerns. *Id.* at 652-665. In *Vernonia*, this Court stated that "the most significant element in this case is the first we discussed: that the policy was undertaken in furtherance of the government's responsibilities under a public school system as guardian and tutor of children entrusted to its care." *Id.* at 665. Although the Seventh Circuit agreed that the Corporation's interest in deterring illegal substance use was not "meaningfully less" than in *Vernonia*, which this Court held was important and compelling, *Id.* at 661, it challenged the efficacy of the means to address the government's concerns. It stated that, as a practical matter, it may be that when a suspicion-based search is workable, the needs of the government will never be strong enough to outweigh the privacy interests of the individual. This Court addressed and rejected this same argument in *Vernonia,* stating:

> Respondents argue that a "less intrusive means to the same end" was available, namely, "drug testing on suspicion of drug use." We have repeatedly refused to declare that only the "least intrusive" search practicable can be reasonable under the Fourth Amendment.

Id. at 663.

As this Court recognized in *Vernonia*, a suspicion-based system entails substantial difficulties, which are equally problematic for the Corporation. For example, a suspicion-based drug testing policy, "generates the expense of defending lawsuits that charge such arbitrary imposition." *Id.* at 663-664. Additionally, a suspicion-based system "adds to the ever-expanding diversionary duties of school teachers the new function of spotting and bringing into account drug abuse, a task for which they [school officials] are ill prepared, and which is not readily comparable with their vocation," noting

that a drug impaired individual "will seldom display any outward 'signs detectable by the lay person or, in many cases, even the physician.'"[6] *Id.* at 664.

What is most problematic with the Seventh Circuit's opinion is that it ignores the fact that the underlying cause of a student's conduct, such as Willis's violent and disruptive behavior, may be drug and alcohol use, even though, after the incident, the student does not appear, on the surface, to be impaired or under the influence at the time of suspension. As recognized earlier, toxicity from drug use remains in a student's system for several days and irritates the brain cells. (App. E, 63a). A toxic student's central nervous system cannot manage itself nor can anyone else manage the moods of a toxic brain. *Id.* Student unmanageability may take the form of overt acting out, disrespect, violence, or abuse. *Id.* In fact, as noted in footnote 8 *infra*, eighty-nine percent (89%) of the students who tested positive under the Corporation's policy at Anderson High School did not exhibit signs of being impaired or under the influence of drugs or alcohol at the time of their suspension when they were seen by a school official. Thus, for those eighty-nine percent (89%) of the students tested, the only observable indication of drug or alcohol use was their disruptive conduct. Therefore, an individualized suspicion-based testing regime based solely upon physical observations entails substantial difficulties in determining whether the underlying cause of the conduct is drug or alcohol use. Without a suspicionless-based testing regime, students whose actions may be the only indication of drug or alcohol

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[6] This is in sharp contrast to the Seventh Circuit's conclusion that every search, especially in the wake of student misconduct that warrants a three-day suspension, can be justified. (App. A, 21a-22a).

use will not be afforded rehabilitation and intervention through a drug education program.

Moreover, the Corporation's drug and alcohol testing policy is an effective and narrowly tailored means to determine whether a student is in need of intervention through drug and alcohol abuse education. For example, the search is only performed on students who engage in conduct specifically prohibited by the policy; the prohibited conduct under the policy is only that which the committee, the school board and parents concluded was causally related to drug or alcohol use based upon the professional literature and statistical data; no law enforcement officials are involved; the results are not used punitively; there are no blanket searches; students participating in extracurricular activities are not searched unless they violate the policy; the intrusiveness of the search is minimal; the testing is not for anything other than drugs or alcohol; the test is standard and does not vary according to the identity of the student; and, the test results are revealed only to parents and school officials on a need-to-know basis.

The Seventh Circuit's opinion also conflicts in principle with *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602 (1989), where this Court upheld as constitutional a drug testing regime based, in part, upon certain rule violations, including noncompliance with a signal and excessive speeding. *Id.* at 611. It is undisputed that Willis knew that fighting was prohibited and knew that a suspension for fighting would make him subject to a drug and alcohol test under the policy. Nevertheless, Willis chose to verbally abuse another student, chose to throw an object at that student, and chose to punch that student four to five times. Had Willis chosen not to engage in these disruptive acts, he would not have been subject to a drug and alcohol

test.[7] As the District Court recognized, "[f]ollowing *Skinner*, a drug testing policy which required a student guilty of misconduct in violation of a school rule to submit to a drug test would be reasonable." (App. B, 53a). In fact, Indiana law authorizes a school to take disciplinary actions in addition to suspension and expulsion that are "necessary to ensure a safe, orderly, and effective educational environment." Indiana Code § 20-8.1-5.1-18 (Burns 1995). Thus, the imposition of a drug and alcohol test is a reasonable disciplinary action imposed upon a student's return from his suspension.

Furthermore, the Seventh Circuit erred when it held that "the [Corporation's] policy cannot be described as 'giving students control, through their behavior, over the likelihood that they [will] be tested.'" (App. A, 18a). As noted in Justice O'Connor's dissenting opinion in *Vernonia,* with which Justice Stevens and Justice Souter joined, publication of the rule "afford[s] potential targets considerable control over whether they will, in fact, be searched because a person can avoid such a search by not acting in an objectively suspicious way." *Vernonia*, 515 U.S. at 667. Indeed, the published policy "giving students control, through their behavior, over the likelihood that they will be tested." *Id.* at

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[7] Instead of focusing on Willis' actions, the Seventh Circuit speculated about the actions of the other student involved. The Seventh Circuit stated that the "the decision to return a punch--often made in less time that it takes the aggressor to deliver the second blow--cannot be analogized to the sort of measured conduct or degree of control discussed in *Vernonia*." (App. A, 19a). However, the actions of the student who was the subject of Willis' conduct is not in issue, whereas the voluntariness of Willis' conduct has never been disputed.

685-686, (O'CONNOR, J. dissenting). No one forced Willis to engage in this disruptive and violent conduct and the Seventh Circuit erred in finding the Corporation's policy unconstitutional.

Finally, the Seventh Circuit gave more weight to Willis' privacy interest than that afforded under *Vernonia*. In *Vernonia*, this Court recognized that "students within the school environment have a lesser expectation of privacy than members of the population generally." *Id.* at 656-657; *quoting New Jersey v. T.L.O.*, 469 U.S. 325, 348 (1985). As noted by this Court, "for their own good and that of their classmates, public school children are routinely required to submit to various physical examinations, and to be vaccinated against various diseases." *Vernonia*, 515 U.S. at 656. The fact that Willis is not a student athlete with an even lesser expectation of privacy is of no consequence.

This Court should find that the Corporation's suspicionless-based drug and alcohol testing policy is constitutional because the Corporation has specials needs, which are part of its responsibilities under a public school system as guardian and tutor of children entrusted to its care, which outweigh the invasion of Willis' privacy interests. Specifically, Willis' expectation of privacy is lessened as a public school student in a school setting and the nature of the intrusion of the urinalysis is negligible and has never been objected to, as compared to the nature and immediacy of the Corporation's concerns for deterring drug use, disciplining its students and protecting the health of children, which are important and compelling, as well as the efficacy of the means for meeting those concerns, which are very precise and narrowly tailored.

2. The Seventh Circuit's Suspicion-Based Analysis Conflicts in Principle with this Court's Decision in *New Jersey v. T.L.O.*, 469 U.S. 345 (1985).

The Seventh Circuit's conclusion that a school official's physical observations of a student at the time of suspension will always trump a finding of reasonable suspicion based upon a student's conduct in light of professional literature and statistical data, which suggests that the conduct bears a causal nexus to drug or alcohol use, conflicts in principle with this Court's determination of what constitutes "reasonable suspicion in a school setting" as enunciated in *T.L.O.* In *T.L.O.*, this Court held that ". . . the legality of a search of a student should depend simply on the reasonableness, under all of the circumstances, of the search." *T.L.O.*, 469 U.S. at 341; *see also Vernonia*, 515 U.S. at 652 ("the ultimate measure of the constitutionality of a governmental search is 'reasonableness'"). The Court in *T.L.O.* explained further:

> Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the sex of the student and nature of the infraction.

T.L.O., 469 U.S. at 342 (footnote omitted). Accordingly, reasonable suspicion does not require a showing of absolute certainty, but only sufficient probability, which is the touchstone of reasonableness under the Fourth Amendment. *Id.* at 346. As this Court recognized, "evidence, to be relevant to an inquiry, need not conclusively establish the ultimate fact in issue, but only have a tendency to make the existence of any fact that is of consequence to the

determination of the action more probable or less probable that it would be without the evidence." *Id.* Thus, this Court held that *T.L.O.*'s possession of cigarettes in her purse gave school authorities reasonable suspicion that she had been smoking in the lavatory against school rules, even though cigarette possession did not conclusively prove that she had been smoking. *Id.* at 345.

The Seventh Circuit found Dean Nikirk's testimony that he saw no reason to suspect that Willis was impaired or under the influence of drugs or alcohol after the fight problematic. The Seventh Circuit opined that the Corporation was arguing that Dean Nikirk's observations must have been incorrect. However, the Seventh Circuit ignored the more plausible alternative established by the Corporation's data: the Dean's observations were not dispositive of the issue of whether Willis' actions were casually related to drug or alcohol use. In *Vernonia*, this Court recognized that "a drug impaired individual 'will seldom display any outward signs detectable by the lay person or, in many cases, even the physician.'" *Vernonia*, 515 U.S. at 664, *citing Skinner*, 489 U.S. at 628. Furthermore, toxicity from intoxicating mood-altering chemicals remains in a student's system for several days and irritates the brain cells. (App. E, 63a). A toxic student's central nervous system cannot manage itself, so student unmanageability may take the form of disrespect, violence, or abuse. *Id.* Thus, students using drugs or alcohol during nonschool hours will predictably not exhibit visible signs of drug or alcohol use, such as blood shots eyes, slurred speech, etc., days or hours later in school when their behavior-- such as fighting--may be the only indication of

substance abuse.[8] The Seventh Circuit erred in reasoning that Dean Nikirk's observations were the end of the inquiry,[9] when his observations were only the initial step in determining whether Willis' conduct was related to drug or alcohol use so as to determine if he was in need of rehabilitation.

Based upon the suspicion-based analysis in *T.L.O.*, the Seventh Circuit was required to determine whether the Corporation's data creates a reason to suspect, to a level of sufficient probability, that a high school student's act of fighting may be caused by illegal drug or alcohol use and not simply stopping the inquiry based upon the school official's observations. Instead, the Seventh Circuit stated that regardless of the correlation between the data and the alleged conduct, physical observations will always trump professional literature and statistical data. Had the Seventh Circuit made the appropriate inquiry, it would have agreed with the District

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[8] During the first semester, Anderson High School reported that 4 of the 147 tests administered were based on reasonable suspicion of being under the influence of drugs or alcohol at the time. Assuming all 4 of those results were positive, it would constitute only 11 percent of the 35 positive tests, not including the 6 test results then pending. (App. F, Anderson High School Drug Screen Statistics, 65a.) In other words, 89 percent of the students who tested positive did not exhibit the signs of being impaired or under the influence of drugs or alcohol when they were suspended even though, by statute, they were seen by a school administrator.

[9] Had Willis exhibited visible signs of being impaired or under the influence of drugs or alcohol at the time of the fight, he would have been suspended on the basis of reasonable suspicion of drug use in addition to fighting.

Court, the committee, the Corporation, and the community, that the underlying data relied upon in establishing the policy gives school officials reason to suspect that a high school student's act of fighting at school, as exhibited by Willis, may be caused by substance use. The underlying data shows that drug users are more than twice as likely to get into physical fights than nonusers and that 50% of users admitted to initiating violence. Additionally, measured test results support the probability that high school students who fight in school may reasonably be suspected of being drug and alcohol users.[10]

Also, the Seventh Circuit did not believe that "individualized suspicion" existed since the finding of reasonable suspicion was based solely upon the Corporation's data. However, as the District Court found, Willis' own actions created the individualized suspicion of drug or alcohol use. Willis knew that fighting was prohibited and that a suspension for fighting would require him to submit to a drug and alcohol test. Nevertheless, Willis verbally abused, threw an object at, and physically punched another student four to five times and, as a result, was suspended for fighting. In light of the Corporation's data, Willis' actions made it reasonable to suspect that *he* may be using illegal drugs or alcohol so as to support a finding of individualized

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[10] Although the Seventh Circuit noted that the publications relied upon in establishing the Corporation's policy states that a list of the possible signs of substance abuse could be endless and cautions that many of the indicators are to some extent normal in many adolescents at certain times, the committee of parents, community leaders, and school officials narrowly tailored the policy to only address disruptive student actions that bear a causal nexus to drug use in the school setting. *See* App. A, 6a-7a, n.1.

suspicion.[11] Thus, Willis' own actions, which have never been disputed, create a reasonable suspicion, in and of itself, of drug or alcohol use.

3. This Case Presents the Opportunity for the Supreme Court to Expand its Holding in *Vernonia Sch. Dist. 47J v. Acton* by Specifically Addressing Student Searches Based upon Specific Rule Violations, Which Bear a Causal Nexus to Drug and Alcohol Use.

At issue here is whether it is reasonable to require high school students who engage in disruptive conduct against certain published rules, which professional literature and statistical data suggest bears a causal nexus to drug and alcohol use, to submit to drug and alcohol testing. As this Court noted in *T.L.O.*:

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[11] As the Seventh Circuit noted in *Bridgman v. New Trier High Sch. Dist. No. 203*, 128 F.3d 1146 (7th Cir. 1997), where a school official conducted a search of a student based in part upon publications supporting her interpretation of the student's symptoms:

> the appropriate inquiry is not whether the medical profession uniformly agrees that the symptoms observed and tests conducted indicate marijuana use. Rather, the question is whether Dailey's actions in ordering the medical assessment and then searching Bridgman's outer clothing were reasonable.

(App. B, 37a-38a); *citing Bridgman*, 128 F.3d at 1149.

> Against the child's interest in privacy must be set the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds. Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems. See generally 1 NIE, U.S. Dept. of Health, Education and Welfare, Violent Schools--Safe Schools: The Safe School Study Report to the Congress (1978). Even in schools that have been spared the most severe disciplinary problems, the preservation of order and a proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult. "Events calling for discipline are frequent occurrences and sometimes require immediate, effective action." *Goss v. Lopez*, 419 U.S., at 580. Accordingly, we have recognized that maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship. See *id.*, at 582-583; *Ingraham v. Wright*, 430 U.S. at 680-682.

T.L.O., 469 U.S. at 339-340.

It is undisputed that drug and alcohol use and its attendant disciplinary problems in public schools, nationwide,

is important and threatens the education of our children. As this Court noted in *Vernonia*,

> That, the nature of the concern is important--indeed, perhaps compelling-- can hardly be doubted. Deterring drug use by our Nation's schoolchildren is at least as important as enhancing efficient enforcement of the Nation's laws against the importation of drugs, which was the governmental concern in Von Raab, or deterring drug use by engineers and trainmen, which was the governmental interest in *Skinner*. School years are the time when the physical, psychological, and addictive effects of drugs are most severe. "Maturing nervous systems are more critically impaired by intoxicants than mature ones are; childhood losses in learning are lifelong and profound;" "children grow chemically dependent more quickly than adults, and their record of recovery is depressingly poor. . . . And of course the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted. In the present case, moreover, the necessity for the State to act is magnified by the fact that this evil is being visited not just upon the individuals at large, but upon children for whom it has undertaken a special responsibility of care and direction . . . (citations omitted.)

Vernonia, 515 U.S. at 661-662.

Additionally, in the concurring opinion in *T.L.O.*,

Justice Powell, joined by Justice O'Conner, recognized that the state has a compelling interest in educating and training its young people:

> The primary duty of the school officials and teachers, as the Court states, is the education and training of young people. A State has a compelling interest in assuring that schools meet this responsibility. Without first establishing discipline and maintaining order, teachers cannot begin to educate their students. And apart from education, the school has the obligation to protect pupils from mistreatment by other children, and also to protect teachers themselves from violence by the few students whose conduct in recent years has prompted national concern. For me, it would be unreasonable and at odds with history to argue that the full panoply of constitutional rules applies with the same force and effect in the schoolhouse as it does in the enforcement of criminal laws.

T.L.O., 469 U.S. at 350.

Accordingly, the relevant inquiry when the government acts as guardian and tutor has always been whether the search is one that a reasonable guardian or parent might undertake. *Vernonia*, 515 U.S. at 665. The Corporation, the committee, school officials and parents alike voiced their opinions in favor of the policy both before and when it was adopted. In fact, no one in the community, but Willis' father, objected to the policy. Thus, drug and alcohol testing on the basis of rule violations that bear a causal nexus to drug and alcohol use is a reasonable inquiry a guardian or

parent might undertake.

Unfortunately, school officials across the nation deal with variations of the same catastrophic theme presented here. Because of the Court's position of allowing student athletes and students participating in extracurricular activities to be searched under the premise that they have a lesser expectation of privacy since they have volunteered to engage in extracurricular activities, students like Willis, whose conduct is in violation of published rules, causes severe disruption in the classroom, and bears a causal nexus to drug and alcohol use, are not subject to drug and alcohol testing. As noted by the Seventh Circuit, testing based upon participation in extracurricular activities will cause "all but the most withdrawn and uninvolved students [to] . . . fall within a category that is subject to testing." (App. A., 19a-20a). For example, the Seventh Circuit allowed a drug testing regime that tested students who volunteered to videotape the football team, be members of the Library Club, and be members of the Future Farmers of America, when there was no evidence supporting a causal nexus between those activities and drug or alcohol use, in sharp contrast to the Corporation's policy, which is supported by professional literature and statistical data establishing a causal nexus between certain disruptive student conduct and drug and alcohol use. *See Todd v. Rush County Schools*, 133 F.3d 984, 985 (7th Cir. 1998), *cert. denied*.

This case presents an extension of *Vernonia*, but as the District Court noted, it is a logical extension. The Corporation's policy is narrowly tailored to only test those students whose conduct is disruptive to the school setting and, as the District Court found, the policy is reasonable and constitutional under the totality of the circumstances test and should be accepted as constitutional by this Court. In her

dissenting opinion in *Vernonia*, Justice O'Connor, joined by Justice Stevens and Justice Souter, stated:

> On this record, then, it seems to me that the far more reasonable choice would have been to focus on the class of students found to have violated published school rules against severe disruption in class and around campus, . . . -- disruption that had a strong nexus to drug use, as the District established at trial. Such a choice would share two of the virtues of a suspicion-based regime: testing dramatically fewer students, tens as against hundreds, and giving students control, through their behavior, over the likelihood that they would be tested. Moreover, there would be a reduced concern for the accusatory nature of the search, because the Court's feared "badge of shame," ante, at 2396, would already exist, due to the antecedent accusation and finding of severe disruption. In a lesser known aspect of *Skinner*, we upheld an analogous testing scheme without little hesitation. See *Skinner*, 489 U.S., at 611, 109 S.Ct., at 1410 (describing " 'Authorization to Test for Cause' " scheme, according to which train operators would be tested "in the event of certain specific rule violations, including noncompliance with a signal and excessive speeding." (citations omitted.)

Vernonia, 515 U.S. at 685-686. This is exactly the policy adopted by the Corporation: testing students who violate published rules against severe and disruptive conduct that bears a causal nexus to illegal drug and alcohol use. Public

school officials dedicated to educating and protecting students should not be left without the tools available to accomplish the crucial job our society has assigned to them. This Court should extend *Vernonia* to allow drug and alcohol testing of high school students who violate certain published rules, such as fighting, which bear a causal nexus to drug and alcohol use.

CONCLUSION

The Petition for Certiorari should be granted because the Seventh Circuit's holding conflicts in principle with this Court's suspicionless-based analysis enunciated in *Vernonia* and this Court's determination of what constitutes reasonable suspicion as enunciated in *T.L.O.* The Corporation's policy passes constitutional muster because it is reasonable given all of the circumstances; Willis has a lesser expectation of privacy as a public school student, the invasion to his privacy interest is minimal, the Corporation's interest in deterring drug and alcohol use among students entrusted to its care is legitimate and compelling, and the Corporation's policy is a very effective and narrowly tailored means. Second, Willis' conduct, in light of the Corporation's data suggesting a causal nexus between drug and alcohol use and fighting, gives individualized reasonable suspicion that the cause of his violent behavior may be drug or alcohol use. Third, the issues raised are important to all public school officials, parents, and students who hope to restore education to their classrooms and school officials who should not be denied the Corporation's policy as an additional tool to deter drug and alcohol use.

JOHNSON, SMITH, PENCE, DENSBORN, WRIGHT & HEATH LLP

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APPENDIX A

United States Court of Appeals
for the Seventh Circuit

98-1227

JAMES RANDALL WILLIS, II,)
by his next friend and father,)
JAMES RANDALL WILLIS,)
Plaintiff-Appellant,)
)
v.)
)
ANDERSON COMMUNITY)
SCHOOL CORPORATION,)
Defendant-Appellee.)
_____/

[Argued April 9, 1998]
[Decided Sept. 9, 1998]

As Amended on Denial of Rehearing
and Suggestion for Rehearing
En Banc Oct. 28, 1998

High school student who was suspended after refusing to submit to drug and alcohol test brought action against school corporation, claiming that corporation's drug testing policy violated Fourth and Fourteenth Amendments. The United States District Court for the Southern District of Indiana, John D. Tinder, J., denied student's motion for

preliminary injunction and entered judgment on merits in favor of corporation. Student appealed. The Court of Appeals, Cudahy, Circuit Judge, held that: (1) statistical data and professional literature concerning causal nexus between use of illegal substances and violent behavior of students were not sufficient to create reasonable suspicion that student was using illegal substance, and (2) corporation's policy requiring drug and alcohol testing of all students suspended for fighting was not justified by special needs.

Reversed.

[1] SCHOOLS 169.5
345k169.5
Fourth Amendment, which applies to states by virtue of Fourteenth Amendment, protects students from unreasonable searches by public school officials. U.S.C.A. Const. Amends. 4, 14.

[2] SEARCHES AND SEIZURES 14
349k14
Collection and testing of urine from students is "search" within meaning of Fourth Amendment.

U.S.C.A. Const. Amend. 4.
See publication Words and Phrases for other judicial constructions and definitions.

[3] SCHOOLS 169.5
345k169.5 School officials do not need to establish probable cause to justify search of student; instead, such search is permissible if it is both justified at its inception and reasonably related in scope to circumstances which justified the interference in the first place. U.S.C.A. Const. Amend. 4.

[4] SCHOOLS 169.5

345k169.5 To satisfy requirement that search of student be justified at its inception, student's conduct must create reasonable suspicion that particular regulation or law has been violated, with search serving to produce evidence of violation. U.S.C.A. Const. Amend. 4.

[5] FEDERAL COURTS 776

170Bk776

Court of Appeals reviews school officials' finding of reasonable suspicion to search student de novo, giving due weight to inferences district court drew from facts. U.S.C.A. Const. Amend. 4.

[5] FEDERAL COURTS 843

170Bk843

Court of Appeals reviews school officials' finding of reasonable suspicion to search student de novo, giving due weight to inferences district court drew from facts. U.S.C.A. Const. Amend. 4.

[6] SCHOOLS 169.5

345k169.5

Statistical data and professional literature concerning causal nexus between use of illegal substances and violent behavior of students at school were not sufficient to create reasonable suspicion that high school student involved in fight with another student was using illegal substance, so as to justify drug and alcohol test; although statistics and literature suggested some relationship between use of illegal substances and fighting, such relationship varied dramatically depending on how testing results were analyzed, and literature described fighting as normal for adolescents. U.S.C.A. Const. Amend. 4.

[7] SEARCHES AND SEIZURES 23
349k23
Suspicionless searches are occasionally warranted by special needs, beyond the normal need for law enforcement. U.S.C.A. Const. Amend. 4.

[8] SEARCHES AND SEIZURES
349k23 When government alleges special need for suspicionless search which is beyond normal need for law enforcement, courts decide whether search is reasonable by undertaking context-specific inquiry, examining closely competing private and public interests advanced by parties. U.S.C.A. Const. Amend. 4.

[9] FEDERAL COURTS 776
170Bk776
Court of Appeals reviews de novo the conclusion as to whether suspicionless search is constitutional under special needs analysis. U.S.C.A. Const. Amend. 4.

[10] SCHOOLS 169.5
345k169.5
School corporation's policy requiring suspicionless drug and alcohol testing of all high school students suspended for three or more days for fighting was not justified by special needs beyond normal need for law enforcement, though corporation had legitimate and immediate concerns in deterring drug use, disciplining its students and protecting health of children, as such concerns could be tackled by means of a traditional, suspicion-based approach. U.S.C.A. Const. Amend. 4.

[11] SCHOOLS 169.5
345k169.5
While public school students do not shed their constitutional rights at the schoolhouse gate, Fourth Amendment rights

nonetheless are different in public schools than elsewhere. U.S.C.A. Const. Amend. 4.

[12] SCHOOLS 177
345k177
Under Indiana law, unless misconduct requires immediate removal of student, child cannot be suspended until he first meets with school principal or similar official. West's A.I.C. 20-8.1-5.1-12.
***416** Kenneth J. Falk (argued), Indiana Civil Liberties Union, Indianapolis, IN, for Plaintiff-Appellant.

Robert M. Baker, III (argued), William C. Wagner, Johnson, Smith, Pence, Densborn, Wright & Heath, Indianapolis, IN, for Defendant-Appellee.

***417** Before CUMMINGS, CUDAHY, and RIPPLE, Circuit Judges.

CUDAHY, Circuit Judge.

In December 1997, high school freshman James Willis was suspended for fighting with a fellow student. Upon Willis' return to school and pursuant to the policy of the Anderson Community School Corporation (Corporation), he was informed that he would be tested for drug and alcohol use. When Willis refused to provide a urine sample, he was suspended again and advised that if he refused to submit to the test upon his return, he would be deemed to have admitted unlawful drug use and would be suspended a third time pending expulsion proceedings. Willis filed suit and claimed, in relevant part, that the Corporation's policy violates the Fourth and Fourteenth Amendments of the United States Constitution. The district court denied Willis' motion for a preliminary injunction and then entered a judgment on the

merits in favor of the Corporation. We reverse.

I. The Policy

In 1996, officials from two high schools in Anderson, Indiana, met to discuss growing disciplinary problems and their perception of increased drug and alcohol use among students. In an effort to address the problem, the Corporation organized a committee of parents, community leaders, school officials and personnel. The committee reviewed the drug and alcohol policies of other Indiana school districts, the results of tests administered pursuant to the policies, and literature discussing the causal nexus between substance abuse and disruptive behavior. The committee eventually formulated a testing policy for the Corporation's secondary schools, which was adopted by the school board in August 1997.

In addition to clarifying that the Corporation will test its students on the basis of individualized suspicion, the policy mandates a drug and alcohol test for any student who: possesses or uses tobacco products; is suspended for three or more days for fighting; is habitually truant; or violates any other school rule that results in at least a three-day suspension. [FN1] The policy explains that its purpose is "to help identify and intervene with those students who are using drugs as soon as possible and to involve the parents immediately." Students do not receive additional punishment when they test positive, and results are disclosed only to parents and a designated school official. However, students who test positive may be expelled from school if they fail to participate in a drug education program. And, as Willis' story illustrates, a student who refuses to undergo a test is considered to have admitted unlawful substance use.

FN1. A student receives a suspension of at least three

days for: computer tampering; disruptiveness on the bus (fourth offense); disruptiveness in the classroom (fifth offense); fighting; leaving campus without permission; possession of or being under the influence of an illegal substance; possession of stolen property; possession of tobacco products (second offense); profanity directed at faculty or staff; smoking; stealing; tardiness (sixth offense); trespassing at another school; and truancy (second offense). It is unclear why the drug testing policy expressly mentions fighting and habitual truancy, since this misconduct is apparently covered by the provision that mandates a test after any suspension of at least three days.

II. Discussion

[1][2] Two points are uncontested. First, the Fourth Amendment, which applies to the states by virtue of the Fourteenth Amendment, protects students from unreasonable searches by public school officials. See New Jersey v. T.L.O., 469 U.S. 325, 333, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985). And second, the collection and testing of urine is a "search" within the meaning of the Fourth Amendment. See Chandler v. Miller, 520 U.S. 305, 117 S.Ct. 1295, 1300, 137 L.Ed.2d 513 (1997); Schaill by Kross v. Tippecanoe County Sch. Corp., 864 F.2d 1309, 1311-12 (7th Cir. 1988). Taken together, these two propositions mean that the Corporation's drug and alcohol screen is a search that is subject to the requirements of the Fourth Amendment. The district court found it was reasonable--and hence constitutional--for the Corporation to search Willis because (1) Willis' conduct created individualized suspicion of drug use, and (2) because the special needs of the ***418** Corporation outweighed Willis' privacy interest.

We consider each of these findings in turn.

A. Individualized Suspicion

[3][4][5] School officials do not need to establish probable cause to justify the search of a student; instead, "such a search is permissible if it is both 'justified at its inception' and 'reasonably related in scope to the circumstances which justified the interference in the first place.' "Bridgman v. New Trier High Sch. Dist., 128 F.3d 1146, 1149 (7th Cir. 1997) (quoting T.L.O., 469 U.S. at 341-42, 105 S.Ct. 733). On appeal, Willis challenges only the district court's conclusion that the Corporation's search would have been "justified at its inception." To satisfy this requirement, a student's conduct must " 'create[ ] a reasonable suspicion that a particular regulation or law has been violated, with the search serving to produce evidence of the violation.' " Id. (quoting Cornfield v. Consolidated High Sch. Dist. No. 230, 991 F.2d 1316, 1320 (7th Cir. 1993)). We review a finding of reasonable suspicion de novo, giving "due weight" to the inferences the district court drew from the facts. See Ornelas v. United States, 517 U.S. 690, 699, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996).

[6] At the outset, our inquiry into whether the Corporation had a reasonable suspicion of drug use seems a bit of a paradox. The deposition testimony of Philip Nikirk, Dean of Students at Anderson High School, reveals that the Corporation required Willis to submit to a urine screen solely because he had been in a fight, which triggered suspension and a mandatory drug test:

> Q. Now, did you observe [Willis] after the fight that gave rise to the initial suspension?
> A. The teacher brought both of the students down to

my office, yes.

Q. Did you observe anything that would make you think he was impaired or under the influence of drugs or alcohol?

A. I had nothing at that time that would give me reasonable suspicion, no.

Q. So the basis for the testing was the fact that a decision was made to suspend him because of the offense of fighting; is that correct?

A. That's correct.

R. 24. Given this testimony, the Corporation's assertion that "Willis' actions established reasonable suspicion of drug or alcohol use," Appellee's Br. at 18, is problematic. The Corporation argues that, in light of the data establishing a "causal nexus" between illegal substances and violent behavior, the fight itself was enough to create reasonable suspicion that Willis was using an illegal substance. We can construe this argument in two ways. From one perspective, the Corporation seems to be contending that fighting alone gives rise to a conclusive presumption of reasonable suspicion and that the Corporation's rule incorporates this presumption. This, however, would belie the very notion of individualized suspicion, which is almost by definition determined on a case-by-case basis. See, e.g., Bridgman, supra; Cornfield v. Consolidated High Sch. Dist. No. 230, 991 F.2d 1316 (7th Cir. 1993). Alternatively, the Corporation may be arguing that its Dean of Students was simply wrong--that in this particular case Willis' conduct created a reasonable suspicion of drug use. Of course, when a school official concludes that a student's conduct creates individualized suspicion of drug or alcohol use, our usual inquiry is whether that conclusion is a reasonable one. See Bridgman, 128 F.3d at 1149. But if the Corporation is arguing that its Dean of Students was incorrect, we would have to turn our traditional inquiry on its

head and ask whether it was unreasonable for Dean Nikirk to conclude that Willis' actions did not create individualized suspicion of drug or alcohol use.

In light of these analytical difficulties, perhaps our discussion of the Corporation's alleged reasonable suspicion could end here. But because the Corporation argues the issue at length, we review its data to show why the "causal nexus" between fighting and illegal substance use is not strong enough to support a conclusive presumption of reasonable suspicion. Or, stated a bit differently, we review the Corporation's data to illustrate ***419** why it was reasonable for Dean Nikirk to conclude that Willis' actions did not create reasonable suspicion.

The Corporation's data has two core components: the results of drug tests administered at the Corporation's two high schools, and various literature demonstrating "a causal nexus between drug and alcohol abuse and disciplinary problems in schools." Appellee's Br. at 2. With respect to the results of the Corporation's tests, during the first semester the policy was in effect, 40% of all students at Highland High School who were suspended for fighting tested positive. At Anderson High School--where Willis was a freshman--18% of all students suspended for fighting tested positive. The record does not contain information about Highland High School freshmen who were suspended for fighting, but 6% of all Highland freshmen who were screened under the policy tested positive. At Anderson High School, 27% of all freshmen tested positive, but none of the freshmen who were suspended for fighting tested positive.

The professional literature documents a relationship between fighting and the use of unlawful substances. It states, for example, that students who use illegal substances are

"more than twice as likely to get into physical fights," and that "50% of users admitted initiating violence." Aggressive and Violent Students, R. 13. In explaining how to recognize drug and alcohol abuse, the literature instructs parents and teachers to look for children who are "defying rules and regulations" and "exhibiting abusive behavior." Adolescent Substance Abuse: Etiology, Treatment, and Prevention, R. 13 at 17-18. It is notable, however, that one of the texts on which the Corporation relies also lists 31 other indications of substance use--including "sleeping more than usual" and "playing parents against each other." Id. The text also states that a list of the possible signs of substance abuse "could be endless," and cautions that many of the indicators "are to some extent normal in many adolescents at certain times." Id. at 18. For this reason, the literature explains, "[c]hanges from the norm, several behaviors going on at once, and frequency of occurrence are most revealing." Id. at 17-18.

As the Supreme Court has acknowledged, articulating a precise definition of "reasonable suspicion" is impossible. See Ornelas, 517 U.S. at 695, 116 S.Ct. 1657. But the Court has made clear that reasonable suspicion is a "commonsense, nontechnical conception[ ] that deal[s] with 'the factual and practical considerations of everyday life on which reasonable prudent men, not legal technicians, act.'" Id. (quoting Illinois v. Gates, 462 U.S. 213,231, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)). With this definition in mind, we think a prudent person would reasonably conclude that while the Corporation's own statistics suggest some relationship between the use of illegal substances and fighting, the relationship is by no means conclusive. Indeed, it varies dramatically depending on how one analyzes the testing results--by school, grade or whatever. (And, even more fundamentally, since it is unknown what percentage of the Corporation's general student population uses drugs or

alcohol, it is also unknown whether--at the Corporation's two high schools-- students who fight are more likely than their peers to use illegal substances.) Moreover, while the professional literature reports that fighting is an indication of substance abuse, it also describes fighting as normal for adolescents and advises that a clustering of disruptive behaviors is most indicative of unlawful substance use. As far as we know, of course, Willis was involved in only a single fight. The same can probably be said about some of the other students who have been suspended for fighting. We therefore cannot find that the Corporation's data is strong enough to conclusively establish reasonable suspicion of substance abuse when a student is suspended for fighting, or that it was unreasonable for Dean Nikirk to conclude that Willis' conduct did not give rise to individualized suspicion. [FN2] Cf. Bridgman, 128 ***420** F.3d at 1147, 1149 (illustrating that student was searched because he exhibited multiple signs of drug use); Cornfield, 991 F.2d at 1323 ("As the facts of this case stand, however, Spencer and Frye relied on a number of relatively recent incidents reported by various teachers and aides as well as their personal observations, the cumulative effect of which is sufficient to create a reasonable suspicion that Cornfield was crotching drugs.") (emphasis added).

> FN2. In its Petition for Rehearing, the Corporation has objected to our use of the word, "conclusive," which it argues changes the accepted meaning of "reasonable suspicion." As indicated at slip op. at 418, 1998 WL 569114 at *2, we have used "conclusive" in combination with "presumption" to indicate the legal effect of the Corporation drug testing policy in the determination of individualized suspicion. Thus, the policy creates a "conclusive" or "irrebuttable" presumption of reasonable suspicion as opposed to a rebuttable one. The definition of

reasonable suspicion itself is not affected by these considerations.

B. Special Needs

[7][8][9] The Corporation's urine screen, however, could still pass muster if it fell within a "closely guarded category of constitutionally permissible suspicionless searches." Chandler, 117 S.Ct. at 1298. These suspicionless searches are occasionally warranted by "special needs, beyond the normal need for law enforcement." Id. at 1301 (quoting Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 619, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989)). When the government alleges such a need, courts decide whether the search is reasonable by undertaking "a context-specific inquiry, examining closely the competing private and public interests advanced by the parties.' Id. After engaging in such an inquiry, the district court found that the Corporation's search was constitutional. We review this conclusion de novo. See United States v. Ross, 32 F.3d 1411, 1415 (9th Cir. 1994).

[10] Willis argues that the district court should not have undertaken a special needs analysis at all. As he sees it, the analysis is inappropriate because "searches based on suspicion [are not] impracticable or impossible in this context." Appellant's Br. at 13. But the Supreme Court has held that a context-specific inquiry is appropriate when "concerns other than crime detection ... are alleged in justification of a Fourth Amendment intrusion." Chandler, 117 S.Ct. at 1301. Here the Corporation has alleged such concerns--deterring drug use, disciplining its students and protecting the health of children. However, as Chandler and other Supreme Court precedent make clear, the practicality of a suspicion-based search is far from irrelevant to our analysis.

The Supreme Court has examined suspicionless drug testing in four different contexts. In Chandler, supra, the Court found that Georgia could not constitutionally require candidates for state office to submit to a drug test. In Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995), the Court upheld random testing of student athletes. In National Treasury Employees Union v. Von Raab, 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989), the Court ruled that it was permissible to test United States Customs officers who carry firearms or hold positions directly related to drug interdiction. And in Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989), the Court upheld testing for railroad employees who violate safety rules or are involved in train accidents. These precedents serve as "our guides" in determining when it is reasonable for the government to require drug testing in the absence of individualized suspicion. Chandler, 117 S. Ct. at 1303.

All of these instructive cases strongly indicate that the feasibility of a suspicion-based search is a key consideration in determining whether it is reasonable for the government to implement a suspicionless regime. See also Vernonia, 515 U.S. at 674-75, 115 S.Ct. 2386 (O'Connor, J., dissenting) (collecting cases outside the drug testing context). And this emphasis on the practicality of a suspicion-based search is unsurprising, since "to be reasonable under the Fourth Amendment, a search must ordinarily be based on individualized suspicion of wrongdoing." Chandler, 117 S.Ct. at 1301. Indeed, Skinner and Von Raab--the first cases addressing suspicionless drug testing--included in their articulation of the special needs analysis the requirement that a suspicion-based approach be unworkable. Skinner, for example, instructs courts to "balance the governmental and privacy interests to assess the practicality of the

[individualized suspicion] *421 requirements in the particular context." 489 U.S. at 619, 109 S.Ct. 1402 (emphasis added). In Von Raab, the Court stated, "[o]ur cases establish that where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." 489 U.S. at 665-66, 109 S.Ct. 1384 (emphasis added). Then, in Vernonia, the Court outlined the contours of the special needs inquiry with greater specificity. Vernonia explained that the reasonableness of a suspicionless search depends upon the balance between (A) the nature of the individual's privacy interest and the character of the intrusion, and (B) the nature and immediacy of the government's concern, as well as the efficacy of the means for meeting that concern. See 515 U.S. at 654, 658, 660, 115 S.Ct. 2386. Under the Vernonia formulation, courts consider the feasibility of a suspicion-based search when assessing the efficacy of the government's policy. See id. at 663, 115 S.Ct. 2386 ("As to the efficacy of this means for addressing the problem .... [individualized suspicion] entails substantial difficulties--if it is indeed practicable at all."); see also Chandler, 117 S.Ct. at 1304.

As a practical matter, it may be that when a suspicion-based search is workable, the needs of the government will never be strong enough to outweigh the privacy interests of the individual. Or, stated slightly differently, perhaps if a suspicion-based search is feasible, the government will have failed to show a special need that is "important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion." Id. 117 S.Ct. at

1303. And maybe this is all Willis is driving at when he argues that we should not undertake a special needs analysis because "searches based on suspicion [are not] impracticable or impossible in this context, " Appellant's Br. at 13. For Willis' central point is that, in this particular context, the Corporation must have reasonable suspicion before demanding that he submit to a drug test. And if we find that the Corporation's "special need" is not strong enough to outweigh Willis' privacy interests, we will have arrived at the point that Willis is trying to make--in the absence of reasonable suspicion, the Corporation is precluded from searching him. But we will not short-circuit the special needs inquiry by focusing solely on the practicality of the search. Instead, we examine each of the factors set forth in Vernonia. [FN3]

> FN3. With respect to the character of the government's intrusion, Willis has not objected to the process by which the urine screen is administered, nor does the record contain any information on this point. We therefore presume that the Corporation's process is similar to the one in Vernonia, which the Court deemed a "not significant" invasion of privacy. 515 U.S. at 660, 115 S.Ct. 2386. Accordingly, our inquiry concentrates on the individual's privacy interest, the nature and immediacy of the government's concern, and the efficacy of the testing policy.

[11] In some ways, the nature of the privacy interest at issue here is similar to that in Vernonia and in Todd v. Rush County Schools, 133 F.3d 984 (7th Cir. 1998), where we upheld the random testing of all students involved in extracurricular activities. While public school students do not "shed their constitutional rights ... at the schoolhouse gate,"

Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 506, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), Fourth Amendment rights nonetheless "are different in public schools than elsewhere," Vernonia, 515 U.S. at 656, 115 S.Ct. 2386. This stems in part from "the schools' custodial and tutelary responsibility for children," and-- with respect to drug testing in particular--the fact that public school students often undergo mandated medical procedures such as vaccinations and scoliosis screening. Id. Like the Vernonia athletes, then, Willis and the other children attending the Corporation's high schools enjoy a "lesser expectation of privacy than members of the population generally." See id. at 657, 115 S.Ct. 2386 (quoting T L.O., 469 U.S. at 348, 105 S.Ct. 733 (Powell, J., concurring)).

But the privacy interest at issue here differs from that in Vernonia in at least two significant respects. First, given the "element ***422** of 'communal undress' inherent in athletic participation," athletes have an even lesser privacy expectation than the general student population. Id. (quoting Schaill, 864 F.2d at 1318). Of course, Todd made no mention of the locker room, and apparently did not consider "communal undress" to be a significant distinction between athletics and other extracurricular activities. But see Trinidad Sch. Dist. No. 1 v. Lopez, No. 97SC124, 1998 WL 373305 (Colo. June 29, 1998) (holding that suspicionless drug testing of all secondary school students involved in extracurriculars violates the Fourth Amendment). However, Todd did emphasize the second factor that distinguishes the privacy interest at issue here from the one in Vernonia--a testing policy for students in athletics or other extracurricular activities "applies only to students who have voluntarily chosen to participate in an activity." Todd, 133 F.3d at 986; see Vernonia, 515 U.S. at 658, 115 S.Ct. 2386.

Despite the Corporation's strained arguments to the contrary, Willis cannot be described as voluntarily engaging in misconduct--at least not as the term "voluntary" is used in Vernonia. There the Court noted a series of steps that an athlete had to take in order to compete--submitting to a preseason physical, maintaining a minimum grade point average, attending practices, etc. See 515 U.S. at 657, 115 S.Ct. 2386. This course of conduct presumably indicates forethought and at least some appreciation of all that participation in an extracurricular activity entails. We doubt that this degree of consideration--and certainly this appreciation of the consequences-- characterizes the typical fight between fifteen-year-olds. In addition, in Vernonia and Todd drug testing could be construed as part of the "bargain" a student strikes in exchange for the privilege of participating in favored activities. In the present case, however, such testing is a consequence of unauthorized participation in disfavored activities.

Moreover, the policy cannot be described as "giving students control, through their behavior, over the likelihood that they [will] be tested.' Id. at 685-86, 115 S.Ct. 2386 (O'Connor, J., dissenting) (considering the reasonableness of a policy that focused on students who violated "published school rules against severe disruption in class and around campus"); see Skinner, 489 U.S. at 611, 109 S.Ct. 1402 (upholding a scheme under which train operators must submit to a urine test when they engage in excessive speeding or violate similar rules). At oral argument we learned that the Corporation does not rely on the proverbial "who started it" in deciding when to suspend after a fight, but instead suspends all who participated in the fight. In other words, the Corporation suspends the victim of the instigator, provided that the victim fights back. Certainly the decision to return a punch--often made in less time than it takes the aggressor to

deliver the second blow--cannot be analogized to the sort of measured conduct or degree of control discussed in Vernonia. In sum, while those subject to the Corporation's drug testing policy have a lessened privacy interest simply because they are children attending school, their privacy interest is nonetheless stronger than that of the students discussed in Vernonia and Todd.

At the outset of our inquiry into the Corporation's need, we must confess to the almost overwhelming temptation, given the effect that drugs have on the children who use them and on the educational process in general, to make the importance of deterring drug use among schoolchildren the beginning and end of our analysis. See Todd, 133 F.3d at 986 ("As defendants explained ... their program was designed to deter drug use and not catch and punish users .... Certainly successful extracurricular activities require healthy students."). But we cannot focus solely on the benefits of deterrence. If this were the only relevant consideration, Vernonia might as well have sanctioned blanket testing of all children in public schools. And this it did not do. See Vernonia, 515 U.S. at 666, 115 S.Ct. 2386 (Ginsburg, J., concurring) (I comprehend the Court's opinion as reserving the question whether the District ... constitutionally could impose routine testing not only on those seeking to engage with others in team sports, but on all students required to attend school.").

***423** This tips up the related need to carefully examine the group to which the testing policy applies. For one insidious means toward blanket testing is to divide students into several broad categories ("extracurricular- ites," troublemakers, etc.) and then sanction drug testing on a category-by-category basis. Eventually all but the most withdrawn and uninvolved students will fall within a category

that is subject to testing. (And the very data relied on by the Corporation reports a relationship between "isolating self" and drug and alcohol use, see Adolescent Substance Abuse, R. 13 at 18, so perhaps we should not be so quick to assume that a school district will not try to clear a path for testing these non-participating students as well.) Our point is that simply invoking the importance of deterrence is insufficient. Instead it is necessary to closely examine both the nature of the government's concern and the efficacy of the policy in this particular case, to ensure that the Corporation's action fits "within the closely guarded category of constitutionally permissible suspicionless searches." Chandler, 117 S.Ct. at 1298.

Having said all this, however, we believe there is little distinction between the nature and immediacy of the Corporation's concern and that of the school districts in Vernonia and Todd. Both cases involve the perennial need to reduce drug use among children. And while the record does not suggest that students who committed disciplinary infractions "were the leaders of the drug culture" or role models--as the athletes in Vernonia were, see 515 U.S. at 649, 663, 115 S.Ct. 2386--the Corporation nonetheless crafted its policy to target the narrow group of students that it perceived as most at risk for substance abuse. See id. at 661-62, 115 S.Ct. 2386; id. at 685, 115 S.Ct. 2386 (O'Connor, J., dissenting) (noting a policy that applied to students who committed severe disciplinary infractions would subject dramatically fewer students to testing than a policy that tested all student athletes). Similarly, while the immediacy of the Corporation's concern does not rise to the level of that in Vernonia--where "a large segment of the student body ... was in a state of rebellion" and "disciplinary actions had reached 'epidemic proportions,'"see id. at 662-63, 115 S.Ct. 2386 (citations omitted)--administrators at the

Corporation's two high schools were trying to address what they perceived as an increasing drug and alcohol problem. We therefore cannot conclude that the nature and immediacy of the Corporation's concern is meaningfully less than that of the Vernonia School District.

However, as our previous discussion alluded, there is sharp contrast between the efficacy of the policy in Vernonia (and, by logical extension, in Todd) and the efficacy of the policy in this case. In Vernonia, a system based solely on individualized suspicion "entail[ed] substantial difficulties-- if it [were] indeed practicable at all." 515 U.S. at 663, 115 S.Ct. 2386. At oral argument, we pushed the Corporation's counsel to explain why individualized suspicion was impracticable in this context. His primary response was that "the school board felt [individualized suspicion] works sometimes, but it's obviously not working in the Anderson schools because we still have a problem." But our determination of whether the Corporation has demonstrated a special need cannot be controlled by the fact that a suspicionless regime casts a wider net than a suspicion-based regime. A suspicion-based approach might never round up as many wrongdoers as a suspicionless system, since some students may be particularly adept at hiding the signs of their drug and alcohol use. Indeed, one of the most effective means of preventing substance abuse among children may be to require them to provide a urine sample each time they pass through the schoolhouse gate. But, as we have tried to emphasize, the Supreme Court has not sanctioned blanket testing. Nor has it renounced the proposition that the Fourth Amendment normally requires individualized suspicion. See Chandler, 117 S.Ct. at 1303. And it is hard to imagine a scenario in which the Corporation's school officials are better-situated to make a determination of individualized suspicion than in the wake of student misconduct that warrants a three-

day suspension.

[12] Under Indiana law, unless the "misconduct requires immediate removal of a student," a child cannot be suspended until he or she first meets with the school principal or ***424** similar official. See Ind. Code§ 20- 8.1-5.1-12. At Anderson High School, it is apparently commonplace for rule-breakers to meet with the Dean of Students. This meeting--mandated by state law--provides an opportunity for the designated school official to observe the child and determine whether there is a reasonable suspicion of substance abuse. Indeed, one of the ironies of this case is that even as the Corporation endeavors to show a special need that warrants abandonment of the Fourth Amendment's usual requirements, the record shows that the Dean of Students at Anderson High School evaluated Willis without any apparent difficulty and determined that "nothing at that time [created] reasonable suspicion."

The scenario prescribed by state law--an individual meeting between the wrongdoer and a high-ranking agent of the school district--distinguishes this case from those in which the Supreme Court has permitted suspicionless drug testing. In Von Raab, Skinner and Vernonia, the Supreme Court "pointed to sound reasons why [an individualized suspicion] standard would be unworkable under the ūnusual circumstances presented." Pierce v. Smith, 117 F.3d 866,886 (5th Cir. 1997) (Dennis, J.,dissenting). In Von Raab, for example, it was impractical to require individualized suspicion before testing customs officials because it was "not feasible to subject [these] employees and their work product to the kind of day-to-day scrutiny that is the norm in more traditional office environments." Von Raab, 489 U.S. at 674, 109 S.Ct. 1384. In Skinner, individualized suspicion was impractical because "the scene of a serious rail accident is chaotic."

Skinner, 489 U.S. at 631, 109 S.Ct. 1402. And although Skinner upheld suspicionless testing after an employee violated certain safety rules--regardless of whether an accident had occurred--the Federal Railroad Administration had been relying on the wrongdoer's co-workers and supervisors to report signs of drug and alcohol use. Because some of these co-workers may have been involved in "pockets of drinking and drug use involving multiple crew members," they were unlikely to provide information to the Administration. Id. at 608, 109 S.Ct. 1402 (internal quotation marks omitted). Accordingly, it was difficult for the Administration to detect more than a small number of the substance abusers. See id. Finally, with respect to Vernonia (and Todd), it was of course infeasible for the Dean of Students or a similar disciplinary figure to meet individually with all the students participating in athletics (or other extracurricular activities).

While our striking down the Corporation's policy may make the job of the Dean of Students or similar school officials slightly more difficult, it is not akin to adding "to the ever-expanding diversionary duties of schoolteachers the new function of spotting and bringing to account drug abuse, a task for which they are ill prepared, and which is not readily compatible with their vocation." Vernonia, 515 U.S. at 663, 115 S.Ct. 2386. At oral argument, the Corporation's counsel described the Dean of Students as already having the "obligation" to identify and investigate drug and alcohol use. And as Dean Nikirk's testimony indicates, the designated disciplinarians are already fulfilling this obligation. Moreover, it is hard to believe that Deans of Students would have any difficulty justifying a finding of reasonable suspicion in fighting cases. Therefore the imposition of a suspicionless policy seems to serve primarily demonstrative or symbolic purposes. See Chandler, 117 S.Ct. at 1305. Finally, Vernonia's concern that a drug testing regime based on

individualized suspicion would transform the process into a "badge of shame" is largely superfluous here, since under the Corporation's current policy, testing is put into motion when a student engages in misconduct. In sum, we are convinced that the Corporation's policy addresses a concern that can be tackled by means of a traditional, suspicion-based approach. Cf. Chandler, 117 S.Ct. at 1304 (explaining that the government has "offered no reason why ordinary law enforcement methods would not suffice to apprehend ... addicted individuals").

As the foregoing analysis indicates, while the nature and immediacy of the government's concern is analogous to that in Vernonia, both the efficacy of the policy and the privacy interest of the individual are different. Particularly because the Corporation has not demonstrated that a suspicion- based ***425** system would be unsuitable, in fact would not be highly suitable, we think the balance of our "context-specific inquiry" tips in favor of Willis. We recognize, however, that we may in theory be precluding suspicionless drug testing for students who are far less sympathetic than those in Vernonia or Todd. But, as we have tried to make clear, it is necessary to establish some boundaries so as not to sanction "routine drug testing ... on all students required to attend school." Vernonia, 515 U.S. at 666, 115 S.Ct. 2386 (Ginsburg, J., concurring). Because a suspicion-based system could easily address the Corporation's concern, the line that we have drawn today strikes us as reasonable.

158 F.3d 415 (Cite as: 158 F.3d 415, *425)

REVERSED.
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APPENDIX B

United States District Court
Southern District of Indiana
Indianapolis Division

JAMES RANDALL WILLIS, II, by his next friend and father, JAMES RANDALL WILLIS, Plaintiff,	)	
v.	)	**IP 97-2038 C-T/G**
ANDERSON COMMUNITY SCHOOL CORPORATION, Defendant.	)	

[Filed January 28, 1998]

ENTRY DENYING VERIFIED MOTION FOR PRELIMINARY INJUNCTION

On December 29, 1997, Plaintiff James Randall Willis II, by his next friend and father, James Randall Willis, commenced this action by filing his Verified Complaint for Declaratory and Injunctive Relief, challenging Defendant Anderson Community School Corporation's ("School Corporation") drug testing policy. Plaintiff also filed his Verified Motion for Temporary Restraining Order or Preliminary Injunction ("Verified Motion"), and a supporting

memorandum of law.

On January 2, 1998, the court held a hearing on Plaintiff's Verified Motion. At the hearing, the parties agreed that the motion and hearing would be limited to the request for a temporary restraining order. The request for a temporary restraining order was denied by the court.

This cause now comes before the court on Plaintiff's Verified Motion for Preliminary Injunction. Having considered the motion, the parties' briefs, affidavits and other submissions, the court finds that the motion should be **DENIED**.

I. Background

In 1996, Kathy Fox, Dean of Students at Highland High School in Anderson, Indiana, discussed her perception of an increasing drug and alcohol abuse problem among high school students in Anderson, Indiana, with Dean Neal Rectar, Dean of Highland High School, as well as with school officials at Anderson High School, who expressed concerns about the increase in disciplinary problems and suspected drug and alcohol abuse. (Fox Aff. ¶¶ 2, 3.) A committee of Anderson community school administrators, deans, parents, community leaders, and central office personnel ("the Committee") was formed and reviewed other schools' drug and alcohol testing policies, surveys, texts and data showing a causal nexus between drug and alcohol abuse and disciplinary problems, and the actual test results from the drug/alcohol testing of the Carmel Clay Schools. *(Id.* ¶ 5.) One such text reviewed explains:

> A great amount of research has been generated on the topic of adolescent substance abuse.

> Within the body of this research, there is a general consensus that *there are certain behaviors which can help identify those adolescents who are using alcohol or other drugs on a regular basis.* Those behaviors include.., truancy and tardiness, *verbal and physical abuse towards staff and classmates,* vandalism, absenteeism, and a sudden drop in grades. These behaviors are not conclusive on their own that a student is using drugs, but they are indicators that point to that possibility.

(Stipulation A to Exs. Introduced at Deps., Ex. 2 at 2 *(Drug Testing Policy Rationale)* (emphasis added); *see also Id.* at 3 (Robert Bowman, *Statistics on Violence)* (noting that drug users are more than twice as likely to get into physical fights than nonusers); *Id.* at 7 (Gary and Ann Lawson, *Adolescent Substance Abuse: Etiology, Treatment, and Prevention)* (acknowledging that "[a]lthough many of the following behaviors are to some extent normal in many adolescents at certain times, frequency of occurrence and clustering of... behaviors [such as "developing a short temper" and "exhibiting abusive behavior"] are indicative of possible substance abuse and should be investigated... ."); (Tegarden[1] Aff., Ex. 2 *(Statistics on Violence* ("Destructive school behaviors such as... violence... correlated with student use of alcohol and other drug use. Users are... more than twice as likely to get into physical fights ...."') The Committee recognized a drug/alcohol abuse problem in their schools on the basis of the number of disciplinary referrals and the types

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[1] R. Stephen Tegarden is the Superintendent of Carmel Clay High Schools (Tegarden Aff. ¶ 20.)

of disciplinary problems, including disruptive behavior in the classrooms such as fighting. (Fox Aff. ¶ 6.)

On or about August 5, 1997, the Anderson high schools adopted a drug and alcohol testing policy. *(Id.* ¶ 8.) The policy's stated purpose is "to help identify and intervene with those students who are using drugs as soon as possible and to involve the parents immediately." (Students Secondary Drug Testing (hereinafter ("Policy") (attached to Pl.'s Compl.) at 3.) The policy expressly states that: "[t]he results of the test are for parental use only and will not result in any additional punishment by school officials." *(Id.* at 3.) Upon a positive test result, a student is required to participate in a drug education program. A refusal to submit to the drug test is considered an admission of being under the influence of alcohol or other drugs, which is a violation of school rules and will be dealt with according to the student discipline policy. *(Id.* at 5.)

The policy provides, *inter alia,* that if a student is suspended from school for more than three days for fighting, the student must submit to a drug test administered under school supervision.[2] The policy is enforced as against all students who are suspended for three days or more, without exception. (Nikirk Dep. at 4.) The test results from the first semester of the 1997-1998 academic year have reflected a correlation between disciplinary problems and drug and alcohol use. *(Id.)* In fact, forty-six percent of all Highland

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[2] The drug testing policy provides in pertinent part: "When students commit a disciplinary infraction which results in suspension from school for three (3) days or more, they will be required to submit to a drug test." (Students Secondary Drug Testing (hereinafter (Policy") at 4 (attached to Pl.'s Compl.)

High School students tested under the policy tested positive for an illegal substance, (Stipulation A to Exs. Introduced in Deps., Ex. 2 at 25), and thirty percent of all expulsions from Highland High were drug-related.[3] *(Id.* at 26.) During the fall semester of the 1997-1998 academic year at Anderson High School, twenty-five percent of all students who were tested, tested positive for illegal substances. *(Id.,* Ex. 4.) More specifically, forty percent of Highland High School students who were tested under the policy because of fighting tested positive for an illegal substance, (Stipulation A to Exs. Introduced in Deps., Ex. 2 at 25 ("Significant Statistics from H.H.S.")); for Anderson High School students, the percentage was eighteen. *(Id.,* Exs. 4, 5.)

Plaintiff, James Randall Willis, II, is a freshman at Anderson High School and is fifteen years old. In early December 1997, Mr. Willis was in a fight with another student. Following the fight, Mr. Willis and the other student were taken to the office of the Dean of Freshman Students at Anderson High School, Philip W. Nikirk. Dean Nikirk observed Mr. Willis and did not observe anything to suggest that he was impaired or under the influence of drugs or alcohol. (Nikirk Dep. at 16.) Mr. Willis was suspended from school for five days because of his fighting. Specifically, he was suspended because he had verbally abused another student, thrown an object at that student, and punched that same student four to five times. (Nikirk Aff. ¶ 4, Ex. 1 .) The student involved in the fight with Mr. Willis was also suspended from school for fighting.

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[3] Forty-one percent of all suspensions from Highland High during the 1996-1997 academic year were drug-related. *(Id.* at 31.)

When Mr. Willis returned to school following his five-day suspension, he was requested to submit to a drug test because he had been suspended for fighting. (Nikirk Dep. at 16.) He was told that he would be tested on December 19, 1997, the next day that the drug testing was to be conducted at the school. Mr. Willis refused to submit to the drug test because he believes that the testing violates his constitutional rights. As a consequence of his refusal, Mr. Willis was suspended for one week commencing the next day of school, which, due to the holiday vacation, was January 5, 1998. He was also advised that if he refused to take the drug test after this one week suspension, he would be suspended again pending expulsion proceedings because his refusal would be deemed an admission of unlawful drug use.

Mr. Willis claims that the School Corporation's drug testing policy, which prohibits him from attending school following his five-day suspension unless and until he submits to a drug test, is an unreasonable search and seizure and an invasion of his privacy, and, therefore, violates his rights under the Fourth and Fourteenth Amendments to the United States Constitution. He also alleges that the policy is an unreasonable search and seizure in violation of the Indiana Constitution, Article 1, Section 11 and that the policy violates Indiana law, Indiana Code § 20-8.1-5.1-8.

II. Discussion

The Seventh Circuit recently set forth the applicable legal standard for issuance of a preliminary injunction:

> When considering a motion for a preliminary injunction, a district court must first determine whether the movant has demonstrated: 1) some likelihood of prevailing on the merits, and 2)

> an inadequate remedy at law and irreparable harm if preliminary relief is denied. If the movant demonstrates both, the court must then consider 3) the irreparable harm the nonmovant will suffer if preliminary relief is granted, balanced against the irreparable harm to the movant if relief is denied, and 4) the public interest, meaning the effect that granting or denying the injunction will have on nonparties.

TMT North America, Inc. v. Magic Touch GmbH, 124 F.3d 876, 881 (7th Cir. 1997) (citing *Grossbaum v. Indianapolis-Marion County Bldg. Auth.*, 100 F.3d 1287, 1291 (7th Cir. 1996), cert. *denied*, 117 S. Ct. 1822 (1997)). In opposing Mr. Willis's motion for preliminary injunction, the School Corporation argues only that Mr. Willis cannot demonstrate some likelihood of prevailing on the merits.

A few propositions important to resolution of this case cannot be reasonably disputed. First, school students do not surrender their constitutional rights at the schoolhouse gate. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969). Second, the Fourth Amendment, applicable to the states by virtue of the Fourteenth Amendment, protects students against unreasonable searches and seizures conducted by public school officials. *New Jersey v. T.L.O.*, 469 U.S. 325, 333 (1985). Third, the collection and testing of urine by the government constitutes a search subject to the Fourth Amendment. *Chandler v. Miller*, __ U.S. __,__, 117 S. Ct. 1295, 1300 (1997); *Skinner v. Railway Labor Executives' Ass'n* 489 U.S. 602, 617 (1989); *see also Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 651 (1995); *National Treasury Employees v. Von Raab*, 489 U.S. 656, 665 (1989). Finally, school students are entitled to a less exacting

protection of their constitutional rights, including Fourth Amendment rights, in the school setting. *See T.L.O.*, 469 U.S. at 340-42; *see also Vernonia*, 515 U.S. at 656 (stating that "the nature of those [constitutional] rights is what is appropriate for children in school.").

"To hold that the Fourth Amendment applies to searches conducted by school authorities is only to begin the inquiry into the standards governing such searches." *T.L.O.*, 469 U.S. at 337; *see also Skinner*, 489 U.S. at 618-19. This is because "the Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable." *Skinner*, 489 U.S. at 619. The constitutionality of a search of a student by a school official in the school setting depends on whether the search was reasonable under all of the circumstances. *T.L.O.*, 469 U.S. at 340-41; *see also Vernonia*, 515 U.S. at 652 ("the ultimate measure of the constitutionality of a governmental search is 'reasonableness'"). Reasonableness is determined by balancing the invasion of the individual's privacy interests against the legitimate governmental interests at stake. *Vernonia*, 515 U.S. at 652-53; *Skinner*, 489 U.S. at 619; *T.L.O.*, 469 U.S. at 337-41.

A. T.L.O. and Reasonable Suspicion[4]

Under *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), a

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[4] The search in *T.L.O.* was conducted on the basis of individualized suspicion. 469 U.S. at 342 n.8; thus, the court understands the *T.L.O.* test to apply where individualized suspicion exists. *See Bridgman v. New Trier High Sch. Dist. No. 203*, 128 F.3d 1146, 1149 (7th Cir. 1997) (applying *T.L.O.* test in case of individualized suspicion).

search of a student by a school official is constitutional if it is both "justified at its inception" and "reasonably related in scope to the circumstances which justified the interference in the first place." *T.L.O.*, 369 U.S. at 341 (quotation omitted); Bridgman v. New Trier High Sch. Dist. No. 203, 128 F.3d 1146, 1149 (7th Cir. 1997). In the Seventh Circuit, "justified at its inception" means that a "'search is warranted only if the student's conduct creates a reasonable suspicion that a particular regulation or law has been violated, with the search serving to produce evidence of the violation.'" *Bridgman*, 128 F.3d at 1149 (quoting *Cornfield by Lewis v. Consolidated High Sch. Dist.* No. *230*, 991 F.2d 1316, 1320 (7th Cir. 1993)). Reasonable suspicion does not require absolute certainty: "'sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment'" *T.L.O.*, 469 U.S. at 346 (quoting *Hill v. California*, 401 U.S. 797, 804 (1971)). The second part of the *T.L.O.* test means that "'the measures adopted [must be] reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.'" *Bridgman*, 128 F.3d at 1149 (quoting *T.L.O.*, 469 U.S. at 342). It appears that Indiana has adopted the "reasonableness under all of the circumstances" test announced in *T.L.O.* for determining whether a search of a school student passes muster under the Indiana Constitution. *See D.I.R. v. State*, 683 N.E.2d 251 (Ind. Ct. App. 1997).

The court determines based on the record before it, that the School Corporation's drug testing policy as applied to Mr. Willis is reasonable under all of the circumstances. The record discloses that the School Corporation formed a committee, including school administrators, parents, and community leaders, charged with the responsibility of reviewing other schools' drug testing policies and data showing a causal nexus between drug and alcohol abuse and

certain behaviors, including verbal abuse towards classmates and physical fighting. They reviewed actual test results from the alcohol and drug testing program conducted by the Carmel Clay schools which revealed that forty percent of the high school students who were tested because of fighting, tested positive for illegal substances. The Committee determined that Highland High School and Anderson High School had drug and alcohol abuse problems in their schools. On this basis, the School Corporation adopted its drug testing policy.

The School Corporation's own test results from the fall semester of the 1997-1998 academic year support the Committee's determination of the existence of a drug and alcohol use problem in their schools. Forty-six percent of the Highland High students who were tested gave positive results for an illegal substance, and at Anderson High twenty-five percent of the tests results were positive. Indeed, thirty percent of all expulsions at Highland High were drug-related. In the cases of students tested because of fighting, forty percent of such students at Highland High tested positive and eighteen percent of such students at Anderson High tested positive.

The court finds evidence in the record establishing that certain disruptive behaviors, such as verbal abuse of another student and fighting are indicative of possible drug or alcohol abuse. Mr. Willis acknowledges that students who use drugs may evidence inappropriate behaviors, (Pl.'s Suppl. Reply Br. In Supp. of Mot. For Prelim. Inj. at 4), but contends that his one incident of such behavior which led to a suspension for more than three days does not establish reasonable suspicion that he was using drugs. *(Id.* at 4-5.) He argues that one fight does not create reasonable suspicion to search for drugs. *(Id.* at 5.)

Mr. Willis relies on the Seventh Circuit's decision in *Cornfield by Lewis v. School District No. 230,* 991 F.2d 1316 (7th Cir. 1993), in support of this argument. In that case, the plaintiff was a high school student who was in a behavioral disorder program. A teacher's aide observed him and suspected that he was "too well-endowed." Another aide and a teacher also observed an "unusual bulge" in the plaintiffs crotch area. The next day, the student was confronted by the teacher and aide with their suspicions that he was "crotching" drugs, and he became agitated and yelled obscenities. Although the student's mother refused consent, a strip search of the student was conducted. No drugs or other contraband was found. The student sued, alleging violations of his Fourth, Fifth, and Fourteenth Amendment rights. *Cornfield,* 991 F.2d at 1319. The Seventh Circuit determined that the student's enrollment in the behavioral disorder program was insufficient to support a reasonable suspicion that he was a drug user. *Cornfield,* 991 F.2d at 1322 (stating "[t]he fact that students in such a program exhibit inconsistent behavior and that drug users behave erratically does not lead inevitably to a conclusion that a student in a behavioral disorder program is a drug user"). In holding that the strip search was based on reasonable suspicion, the court relied on other factors, including reports that the student had drugs and the student's claims that he dealt drugs and would test positive for marijuana, *Id.*

Cornfield is distinguishable. It is not argued that reasonable suspicion arises from Mr. Willis's enrollment in any type of behavioral disorder program as in *Cornfield.* Nor is reasonable suspicion premised upon inconsistent or erratic behavior. Rather, the reasonable suspicion is supported by the nexus between the disciplinary behaviors in which Mr. Willis engaged, specifically verbal abuse and physical fighting, and possible drug or alcohol abuse. Further, there is no indication

in *Cornfield* of any texts or data reflecting a causal nexus between behavioral disorders, inconsistent behavior, or erratic behavior and possible drug or alcohol abuse. In this case, there is. In the instant case, texts and data, including tests results from the Carmel Clay schools reflects a correlation between certain disruptive behaviors and drug and alcohol abuse. Indeed, even the test results from Highland High and Anderson High show such a correlation.[5]

Although this is a close call, the court finds that there is a sufficient correlation between Mr. Willis's one instance of fighting and drug or alcohol abuse so as to permit the proposed search. The court recognizes that not all misconduct or bad behavior indicates possible drug and alcohol abuse. Indeed, some of the literature reviewed by the Committee and in the record before the court teaches that such behavior is "to some extent normal," (Tegarden Aff., Ex. 2), and that "frequency of occurrence and clustering, of these behaviors are indicative of possible substance abuse and should be investigated." *(Id.)* Admittedly, there is nothing in the record to suggest that Mr. Willis frequently engaged in certain behaviors linked with possible drug and alcohol abuse or that he showed a clustering of such behaviors. Yet, the evidence in the record is sufficient to establish reasonableness under the circumstances.

At first blush, Dean Nikirk's testimony that he had no reason to suspect Mr. Willis of being under the influence of

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[5] *Burnham v. West,* 681 F. Supp. 1160 (E.D. Va. 1987), *opinion supplemented by* 681 F. Supp. 1169 (E.D. Va. 1988), and *Cales v. Howell Public Sch.,* 635 F. Supp. 454 (E.D. Mich. 1985), relied on by Mr. Willis, (Pl.'s Suppl. Br. at 5-6), are distinguishable for these reasons as well.

drugs or alcohol following the fight resulting in Mr. Willis's suspension seems somewhat problematic in light of *Bridgman v. New Trier High School District No. 203,* 128 F.3d 1146 (7th Cir. 1997).[6] However, closer consideration reveals that *Bridgman* presents no barrier to concluding that Mr. Willis's conduct creates a reasonable suspicion for the particular search at issue in this case. In *Bridgman,* Mary Dailey, a school official, observed the plaintiff acting unruly and inappropriately in an after-school smoking cessation program. Ms. Dailey noticed that the student's eyes were bloodshot, his pupils were dilated, and she claimed that some of his answers on a worksheet were "flippant." *Bridgman,* 128 F.3d at 1147.[7] These observations made her suspicious that the student had been using marijuana. She conducted a medical assessment of him, which revealed that his blood pressure and pulse were "considerably higher" than the readings listed on the student's freshman physical examination. A search of the student's outer clothes was then conducted. A drug test taken the next day conclusively indicated that the student had not been using marijuana. *Id.* at 1147-48.

In opposing summary judgment, the student presented expert testimony that the physical symptoms on which Dailey relied and the blood pressure and pulse readings were not

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[6] When Dean Nikirk was asked whether he observed anything that would make him think Mr. Willis was under the influence of drugs or alcohol after the fight, Dean Nikirk answered, "I had nothing at that time that would give me reasonable suspicion, no." (Nikirk Dep. at 16.)

[7] She also claimed that his handwriting was erratic, but the Court found that this claim was unsupported by any evidence that she had observed his handwriting previously. *Id.* at 1147, 1149.

reliable indicators of marijuana use. The defendants presented evidence that bloodshot eyes, dilated pupils, and increased blood pressure and pulse indicated marijuana use. *Id.* at 1149. The Court explained:

> the appropriate inquiry is not whether the medical profession uniformly agrees that the symptoms observed and tests conducted indicate marijuana use. Rather, the question is whether Dailey's actions in ordering the medical assessment and then searching Bridgman's outer clothing were reasonable.

Id. The Court determined that "symptoms were sufficient to ground Dailey's suspicion," *Id.*, and held that her suspicions were reasonable on the basis of her expertise as a drug addiction counselor, coupled with the publications supporting her interpretation or the student's symptoms and her use of the medical assessment. *Id.* In reaching this conclusion, the Court assumed that the decision to test and search the student was based upon the behavioral and physical symptoms observed. *Id.*

The decision to test Mr. Willis was not based on any behavioral or physical symptoms (such as bloodshot eyes or the odor of alcohol or drugs) observed by Dean Nikirk other than the fight itself; Dean Nikirk testified that the reason Mr. Willis was requested to submit to the drug test was because he had been suspended for fighting. However, as in *Bridgman,* publications support the School Corporation's determination that certain disruptive and bad behaviors indicate possible drug or alcohol abuse. Even the School Corporation's own test results from the Fall Semester of the 1997-98 academic year bear out this correlation. As in *Bridgman,* the decision to test Mr. Willis is, in fact, based on Mr. Willis's own

behavior. In adopting its drug testing policy, the School Corporation made the determination that certain disruptive behaviors, including fighting, were indicative of possible drug or alcohol abuse. That Mr. Willis verbally abused, threw an object at, engaged in a physical fight with another student, and was suspended for more than three days as a result, is not disputed. Thus, although Dean Nikirk did not personally observe any physical symptoms of Mr. Willis which caused him to suspect that he was under the influence of drugs or alcohol, the decision to subject Mr. Willis to the drug test was based upon his disruptive behavior, which has not been disputed.[8] Given the information correlating such disruptive behavior with illegal drug and alcohol abuse, including the test results from both Highland High and Anderson High, Mr. Willis's own disruptive behavior creates a reasonable suspicion that he had been using illegal drugs or alcohol so as to require his submission to the drug test before he may be allowed to return to school. Therefore, the court determines that the search at issue in this case is "justified at its inception."

The court further concludes that the drug test is reasonably related in scope to the objectives of the search and is not excessively intrusive on Mr. Willis privacy rights. First and foremost, the sole stated purpose of the drug testing policy is "to help identify and intervene with those students who are using drugs as soon as possible and to involve the parents immediately," (Policy at 3), with the benefits of

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[8] That Mr. Willis's fighting led to suspension for more than three days rather than some lesser disciplinary action suggests the seriousness of Mr. Willis's offense. The court presumes that not all student fights lead to suspension or even suspension for more than three days.

counseling as a goal. a positive result in the drug test enables the School Corporation to identify a student who uses drugs and involve the parents or guardians in drug education and intervention. Significantly, the scope of the search at issue is limited by the manner in which the School Corporation utilizes the test results. In describing the privacy interests implicated by the drug testing process in *Veronia School District 47J v. Acton,* 515 U.S. 646 (1995) as "negligible," Justice Scalia noted that the test results were not turned over to law enforcement or used for any school disciplinary function and were released to only a few school personnel on a need-to-know basis. *Id.* at 658. The results of tests taken under the policy in this case are neither turned over to law enforcement nor used in any disciplinary action. Further, the test results here are shared only among the parents, the student, and a small number of school administrators. A positive test result cannot be used to refuse readmittance to school or as grounds for further suspension or other such consequence.

The court concludes that the search at issue in the instant case satisfies the two-part test for suspicion-based searches enunciated in *T.L.O.* Accordingly, the court determines that Mr. Willis has not demonstrated a likelihood of prevailing on his claim that the search occasioned by the School Corporation's drug test is unreasonable under the circumstances and, therefore, in violation of his Fourth Amendment rights.[9]

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[9] Given this conclusion and given that Indiana law follows *T.L.O.*, the court does not, and need not, address the claim that the drug testing policy is an unreasonable search and seizure in violation of the Indiana Constitution, Article 1, Section 11. Also, the court does not find that the policy violates an Indiana statute,

B. Special Needs and Suspicionless Searches

Even assuming that the search at issue in this case is not based upon reasonable suspicion, it is nevertheless reasonable given the minimal intrusion on Mr. Willis's privacy interests balanced against the special needs of the School Corporation. Ordinarily, individualized suspicion of wrongdoing is required for a search to be reasonable under the Fourth Amendment. *Chandler v. Miller*, U.S. ___, ___, 117 S. Ct. 1295, 1301 (1997).[10] However, individualized suspicion is not always required. *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 664-65 (1995) (upholding suspicionless random drug testing of student athletes); *National Treasury Employees v. Von Raab*, 489 U.S. 656, 665 (1989) ("neither a warrant nor probable cause, nor, indeed, any measure of reasonable suspicion is an indispensable component of reasonableness in every circumstance"); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 624 (1989) ("a

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Indiana Code § 20-8.1-5.1-8, which provides that the grounds for student suspension or expulsion are student misconduct or substantial disobedience occurring: on school grounds during certain times; off school grounds at a school activity, function or event; or while the student is traveling to or from school, a school activity, function, or event. Mr. Willis's refusal to submit to the drug test would constitute substantial disobedience, and, therefore, provides sufficient grounds for his suspension for refusing the test. (Nothing in the record suggests that Mr. Willis has been expelled or even that expulsion proceedings have commenced against him; thus, the court does not decide whether his refusal to submit to the test constitutes sufficient grounds for expulsion.)

[10] Chandler held that the Fourth Amendment proscribed a state statute which conditioned ballot eligibility on the candidate's negative urine test for drugs.

showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable."); *Martinez-Fuerte*, 428 U.S. 543, 560-61 (1976) (stating that although "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure[,]... the Fourth Amendment imposes no irreducible requirement of such suspicion") (citation and footnote omitted); *see also T.L.O.*, 469 U.S. at 342 n.8 ("We do not decide whether individualized suspicion is an essential element of the reasonableness standard we adopt for searches by school authorities.").[11] As this court has explained:

> [E]xceptions to the main rule are sometimes warranted based on "special needs, beyond the normal need for law enforcement."... When such "special needs" --concerns other than crime detection -- are alleged in justification of a Fourth Amendment intrusion, courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties.

Todd v. Rush County Schs., No. IP96-1417-C-T/G, 1997 WL 710661, at *5 (S.D. Ind. June 2, 1997)(quoting *Chandler*, 117 S. Ct. at 1301 (citations omitted)), aff'd, No. 972548, 1998 WL 7352 (7th Cir. Jan. 12, 1998); see *also Von Raab*, 489 U.S. at 665; cf. Akhil R. Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 784 n.100 (1994) ("individualized suspicion makes sense as a prerequisite for warrants, but it does not make sense as the test for all searching and seizing-outside the criminal context, for

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[11] The search in *T.L.O.* was based upon individualized suspicion. *Id.*

example").

In *T.L.O.*, the Supreme Court first recognized the existence of "special needs" in the public school context. The Court noted that the special needs exception applies only "where the privacy interests implicated by a search are minimal and where 'other safeguards' are available 'to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.'" T.L.O., 469 U.S. 342 n.8; *see also Skinner,* 489 U.S. at 624 (stating exception applies where privacy interests are minimal and "an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion"). In *T.L.O.*, the Court balanced the student's privacy interests and the school's need to maintain order and discipline in the school setting, and held that a warrant was not required for a search of a student by a school official. 469 U.S. at 340-41. The Court explained that "requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools." *Id. T.L.O.* not only eliminated the warrant requirement, but also reduced the level of suspicion needed to justify a search. *Id.* at 341. Nevertheless, the search in *T.L.O.* was based on individualized suspicion. *Id.* at 342 n.8.

The Supreme Court subsequently applied the "special needs" exception in upholding the constitutionality of random drug testing of students who participated in athletics in *Veronia School District 47J v. Acton,* 515 U.S. 636 (1995).[12]

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[12] "Special needs" have been found in a number of other contexts, including regulation of the conduct of railroad employees

The drug testing program in *Veronia* was motivated by a "sharp increase" in disciplinary problems due to drug use, *id.* at 648, with the athletes as leaders in the drug culture. *Id.* at 649. The student body was in a "state of rebellion," with disciplinary problems at "epidemic proportions." *Id.* The expressed purpose of the drug testing program was "to prevent student athletes from using drugs, to protect their health and safety, and to provide drug users with assistance programs." *Id.* at 650. Only a limited number of high-ranking school officials had access to the test results. *Id.* at 651. If a student tested positive, a second test was taken. If the second test was positive, the student's parents were notified and the student could be suspended from athletics. (A negative result led to no further action.) *Id.*

The Supreme Court held the drug testing program reasonable under the Fourth Amendment. The Court first explained that "whether a particular search meets the reasonableness standard "'is judged by balancing its intrusion on the individual's Fourth Amendment interests against the promotion of legitimate governmental interests.'" *Veronia,* 515 U.S. at 652-53 (citations omitted). The Court first considered the nature of the privacy interest at stake and said that public school children had a lesser expectation of privacy than the regular population. *Id.* at 654-55. The Court stated that *T.L.O.* had "emphasized that the nature of [the state's] power [over school children] is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults." *Id.* at 655; *see also Todd v. Rush County Schs.*, No. 972548, 1988 WL 7352, at *2 (7th

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for safety purposes, *Skinner,* 489 U.S. at 620, and in drug testing of Customs Service employees who would carry firearms or engage in drug interdiction. *Von Raab,* 489 U.S. at 668.

Cir. Jan. 12, 1998) (citing *Veronia*). *The* Court also recognized that school authorities act "in loco parentis" for many purposes and that they regularly are required to submit to many types of physical examinations. *Id.* at 654-55. The Court noted that the students voluntarily participated in athletics. *Id.* at 657. The Court emphasized that student athletes had an even greater reduction in their expectation of privacy because they gave up more privacy in order to participate in athletics, *id.*, and that the risk of physical harm to drug users who are athletes was high. *Id.* at 662.

The *Veronia* Court next considered the character of the intrusion on the privacy interest caused by the drug testing, focusing on the manner of testing and the information disclosed by the testing. 515 U.S. at 658-60. The Court noted that the testing was performed under conditions "nearly identical to those typically encountered in public restrooms," and, therefore, concluded that invasion of privacy by virtue of the testing process was "negligible." *Id.* at 658. The Court found "significant" that the tests screened only for drugs and not for other conditions such as diabetes, epilepsy, or pregnancy. *Id.* (citing *Skinner,* 489 U.S. at 617). The Court also noted that the tests were standard and did not vary according to the student's identity. Lastly, it was significant that the test results were disclosed only to a few school officials on a need-to-know basis and were not used for any internal discipline or given to law enforcement. *Id.*

The *Veronia* Court determined that the nature of the government concern -- deterring drug use by students -- was important, if not compelling. *Veronia,* 515 U.S. at 660-63; *see also Todd,* 1998 WL 7352, at *2. The Court found that the "[s]chool years are the time when the physical, psychological, and addictive effects of drugs are most severe." *Id.* at 661. It was noted that student drug use affected

not only the users but also the entire student body, the faculty, and the educational process. *Id.* at 662. The *Veronia* Court explained:

> The most significant element in this case is the first we discussed: that the Policy was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care .... [W]hen the government acts as guardian and tutor the relevant question is whether the search is one that a reasonable guardian and tutor might undertake.

Id. at 665. The Court noted that there was no significant opposition to the drug testing program: although a public meeting was held to ascertain parents' opinions on the program, no one other than the parents involved in the case before the Court had objected. *Id.*

The Seventh Circuit's recent decision in *Todd v. Rush County Schools,* No. 972548, 1998 WL 7352 (7th Cir. Jan. 12, 1998), took *Veronia* one step further. *Todd* upheld random, suspicionless drug, alcohol, and tobacco testing of all high school students who participate in any extracurricular activity. A positive test result was not used in school disciplinary proceedings, but the student could be barred from athletics. *Id.* at *1. The Seventh Circuit stated that its decision was governed by *Veronia* and *Schaill v. Tippecanoe County School Corporation,* 864 F.2d 1309 (7th Cir. 1988) (upholding random drug testing for student athletes). The policy at issue in *Todd,* as in *Veronia* and *Schaill,* "was undertaken in furtherance of the school districts' 'responsibilities, under a public school system, as guardian and tutor of children entrusted to its care.'" *Todd,* 1998 WL

7352, at *2 (quoting [*Veronia,* 515 U.S. at 665,] 115 S. Ct. at 2396). In fact, the *Todd* court described the "linchpin" of the drug testing program as "protect[ing] the health of the students involved." *Id.* In *Todd,* as in *Veronia* and *Schaill,* students were required to submit to a drug test only as a condition of their voluntary participation in an extracurricular activity. *Id.,* at *3; *Schaill,* 864 F.2d at 1319. Further, as in *Veronia,* the drug testing "program was designed to deter drug use and not to catch and punish users." *Todd,* 1998 WL 7352, at *2. The Seventh Circuit has viewed participation in extracurricular activities as a benefit, with "enhanced prestige and status in the student community," and has explained that "it is not unreasonable to couple these benefits with an obligation to undergo drug testing." *Todd,* 1998 WL 7352, at *3 (quoting *Schaill,* 864 F.2d at 1320). Therefore, the Seventh Circuit held that the drug testing at issue in *Todd* did not violate the Fourth Amendment. *Todd,* 1998 WL 7352, at *2-3.

The "special needs" exception is applicable in the instant case. The search at issue is not based on the normal need for law enforcement or crime detection. *See, e.g., Von Raab,* 489 U.S. at 666. No law enforcement officials are involved in the testing, and the results of the test are not used punitively. As the Supreme Court expressed in *T.L.O.*, "the substantial need of teachers and administrators for freedom to maintain order in the schools" is a special need such that "the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search." *T.L.O.,* 469 U.S. at 341.

Mr. Willis contends that the search at issue is not random and *Veronia* does not apply. He is correct that the search in this case is not random, but he points to no language in *Veronia* which limits its special needs analysis to random

searches. Indeed, the court finds no such language in the *Veronia* majority opinion. The court recognizes, however, that applying *Veronia's* principles to a nonrandom search is an extension of *Veronia,* but it is the logical extension.

The determination that this case presents "special needs" in and of itself is not sufficient. The court must consider the privacy interests at stake. *See Pierce v. Smith,* 117 F.3d 866, 874 (5th Cir. 1997) (holding defendants entitled to qualified immunity as a defense to medical resident's claim that requiring her to submit to urinalysis drug testing violated her Fourth Amendment rights). As the *Veronia* Court found, public school children have reduced expectations of privacy in the school setting. Thus, Mr. Willis, as a public school student, has a reduced privacy interest, and the nature of his privacy rights is only that which is appropriate for public school children. Because Mr. Willis is not, at least according to the record before this court, a student athlete, who has an even lesser expectation of privacy, is of no consequence. Importantly, the Court first noted that all public school students had a lesser privacy interest, and then added that for student athletes the expectation was even lower. That Mr. Willis is a public school student is sufficient to lessen his privacy interests in the school setting.

Moreover, the intrusiveness of the search here is quite minimal. It is noted that Mr. Willis has not objected to the process by which the drug test is conducted, and the court presumes that the process is similar to that used in *Veronia.* There, the Court found the privacy interests invaded by such a process to be "negligible." *Veronia,* 515 U.S. at 658. There is no evidence that drug test is used to screen for anything other than drugs and alcohol, such as diabetes or epilepsy. *See id.* Additionally, it appears that the test is standard and does not vary depending on the identity of the student being tested.

Only positive test results are disclosed, and the results are disclosed to a very limited group of people on a need-to-know basis. The test is not undertaken for law enforcement purposes or to catch and punish drug users, and law enforcement personnel are not involved in the testing in any manner. The court finds that the character of intrusion on Mr. Willis's privacy interests is similar to that upheld in Veronia.

That the drug testing policy is not limited to students who voluntarily choose to participate in athletics or other extracurricular activities as in *Veronia* and *Todd* is not decisive. The School Corporation argues that Mr. Willis "essentially chose to be subject to the drug test just as if he had participated in athletics or other activities under *Veronia* and *Todd"* by fighting "with full knowledge of the drug testing policy." (Suppl. Br. at 45.) Although Mr. Willis is correct that he did not, by virtue of fighting, waive his Fourth Amendment rights, (Pl.'s Suppl. Br. at 8), his misconduct in fighting is unavoidably one aspect of the totality of the circumstances under which the reasonableness of the search is determined. Mr. Willis is presumed to know the terms of the School Corporation's drug testing policy. By fighting, he voluntarily engaged in conduct which, under the policy, increased the likelihood that he would be subjected to a drug test. Like the students who chose to participate in athletics in *Veronia* and the students who chose to participate in extracurricular activities in *Todd* with the knowledge that their conduct (participation) could subject them to a drug test, Mr. Willis chose to engage in misconduct that could subject him to a drug test. *See Veronia,* 515 U.S. at 685-86 (O'Connor, J., dissenting) (noting that a drug program which tested students who violate rules would allow them to control through their behavior the likelihood of being tested) Thus, this case is more similar to *Veronia* and *Todd* than Mr. Willis suggests. Further, as with a search based on individualized

suspicion, under the School Corporation's drug testing policy, students have "considerable control over if they will, in fact, be searched," *Veronia,* 515 U.S. at 667 (O'Connor, J., dissenting), because they can avoid the search by not engaging in the types of misconduct that increases the likelihood of their being subjected to a drug test under the policy.

That students can control the likelihood of their being searched under the School Corporation's drug testing policy is a significant factor that weighs in favor of finding the search reasonable under the circumstances. Justice Ginsburg's concurring opinion in *Veronia* provides further support in this regard. She explained that *Veronia* reserved "the question whether the District, on no more than the showing made here, constitutionally could impose routine drug testing not only on those seeking to engage with others in team sports, but on all students required to attend school." *Veronia,* 515 U.S. at 666 (Ginsberg, J., concurring). She then referred to *United States v. Edwards,* 498 F.2d 496, 500 (2d Cir. 1974), an airport search case, stressing that travelers could avoid a suspicionless search of their persons and luggage "by choosing not to travel by air." *Id.* As one scholar has observed:

> It is significant that this theme runs through most of the nonsuspicion search cases: the airline traveler, the border crosser, the businessman who elects to undertake a closely regulated business, the employee who elects to take a job necessity his close scrutiny, all can in a sense be said to have opted for this highly unusual suspicionless search regime. (The notion is not that by electing to engage in that activity the person has impliedly consented to the search, but only that this opportunity to

> avoid such intense scrutiny is of some relevance in making a judgment about the reasonableness of a suspicionless search scheme.) It is also significant that this very point was given considerable emphasis by the *Acton* majority; they stressed that student athletes have "even less" privacy than students generally because in choosing to participate in athletics "they voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally."

4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (West Publishing Co., 3d ed. 1996 & 1998 Supp.) § 10.11. Mr. Willis did not impliedly consent to the search by engaging in misconduct of fighting; however, the fact that he could have avoided the drug test by refraining from such misconduct is relevant to the determination of reasonableness of the search at issue and, weighs in favor of a determination that the search is reasonable.

Finally, the nature of the School Corporation's interest must be balanced with Mr. Willis's privacy interests. The School Corporation's interest in deterring drug use by and protecting the health of its students is indeed important, if not compelling. *See Veronia,* 515 U.S. at 661; *Todd,* 1998 WL 7352, at *2-3. Similar to *Veronia,* the drug testing policy was undertaken in furtherance of the public school system's responsibilities as guardian and tutor, which the Supreme Court deemed "most significant." *Veronia,* 515 U.S. at 665. Given the recognition of an increasing drug and alcohol abuse problem among the high school students within the School Corporation, reflected in the number and types of disciplinary problems, the court concludes that a reasonable guardian and

tutor might require Mr. Willis to submit to a drug test under the circumstances presented.[13] The court recognizes that the record does not necessarily show that the problem in the Anderson schools rises to the epidemic levels existing in *Veronia*. However, in *Todd v. Rush County Schools*, No. IP96-1417-C-T/G, 1997 WL 710661 (S.D. Ind. June 2, 1997), *aff'd*, No. 97-2548, 1998 WL 7352 (7th Cir. Jan. 12, 1998), this court explained:

> There is no minimum triggering point of substance abuse (such as ten percent or fifty percent of the student population) that must be met to justify the 'important enough' interest on the part of the school system discussed in *Veronia*. Some use of these prohibited substances by youth may give rise to legitimate concern about the potential for a rapid increase in abuse, if unchecked.

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[13] It is significant that the testing is done here *after* the suspension rather than immediately following the fight. It cannot be confused with evidence gathering to support the suspension for fighting. This timing reflects legitimate concern by school authorities about how the suspended student utilizes the idle time of the suspension as well as concern about collateral conduct which may underlie the disruptive behavior that resulted in the suspension. These are appropriate concerns for the school officials before returning the suspended student to the environment in which the disruption occurred. This point in time may also be ideal for parental and counseling intervention in response to rebellious behavior in the form of substance abuse, manifested by disruptive behavior.

Id. at *7. That reasoning applies equally here. Moreover, the record shows that no parent or guardian of a student attending school within the School Corporation, other than Mr. Willis's father, has disagreed. On the basis of the record before it, the court is hesitant to dispute the determination of the parents, guardians, and the School Corporation that the drug testing policy is reasonably within the student's interests under the circumstances. *See Veronia,* 515 U.S. at 665.

The School Corporation further contends that its drug testing policy is a permissible disciplinary action. (Defs.' Suppl. Br. In Opp'n to Entry of Prelim. Inj. at 3.) In *Skinner,* the Court upheld a regulation which, *inter alia,* gave railroad officials the discretion to test employees for alcohol and drugs, without individualized suspicion of drug use, provided they had violated certain safety rules, including noncompliance with a signal and excessive speeding. *Skinner,* 489 U.S. at 611,634. Following *Skinner, a* drug testing policy which required a student guilty of misconduct in violation of a school rule to submit to a drug test would be reasonable. There is even less discretion under the School Corporation's policy than under the regulation challenged in *Skinner* where the decision to test an employee for violating a rule was a discretionary one. Here, the test is mandatory if the student meets the criteria under the policy, and as Dean Nikirk has testified, the students are required to submit to the tests without exception.

Under all the circumstances of this case, where law enforcement and crime detection are not the design or end result of the drug testing policy; the need to deter drug use by school students in Anderson, Indiana is a very important, if not compelling, governmental interest; and where the intrusiveness of the drug test and Mr. Willis's privacy interests are minimal, requiring Mr. Willis to submit to a drug

test upon his return to school appears to be reasonable. The School Corporation has advanced a legitimate reason for requesting Mr. Willis to submit to the drug test. As the Seventh Circuit reiterated approximately two weeks ago:

> the plague of illicit drug use which currently threatens our nation's schools adds a major dimension to the difficulties the schools face in fulfilling their purpose - the education of our children. If the schools are to survive and prosper, school administrators must have reasonable means at their disposal to deter conduct which substantially disrupts the school environment.

Todd v. Rush County Schs., No. 97-2548, 1998 WL 7352, at *3 (7th Cir. Jan. 12, 1998) (quoting *Schaill v. Tippecanoe County Sch.* Corp., 864 F.2d 1309, 1324 (7th Cir. 1988)).

When Mr. Willis's privacy interests are balanced against the important governmental interest at stake, the search at issue appears to be reasonable under all the circumstances. The court holds, therefore, that Mr. Willis has not shown a likelihood of prevailing on his claim that the School Corporation's drug testing policy as applied to him under the circumstances constitutes an unreasonable search of his person in violation of the Fourth Amendment or in violation of the Indiana Constitution. Similarly, he has not shown that the policy violates Indiana Code § 20-8.1-5.1-8. Accordingly, the Verified Motion for Preliminary Injunction is **DENIED**.

III. Conclusion

Mr. Willis has not shown a likelihood of success on

the merits of his claim that the search conducted under the School Corporation's drug testing policy is unreasonable under all the circumstances or in violation of Indiana law. Therefore, his Verified Motion for Preliminary Injunction is **DENIED**.

ALL OF WHICH IS ORDERED this 28th day of January 1998.

/s/_____
John Daniel Tinder, Judge
United States District Court

Copies to:

Kenneth J. Falk
Indiana Civil Liberties Union
1031 E. Washington St
Indianapolis, IN 46202

Robert M. Baker III
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APPENDIX C

United States District Court
Southern District of Indiana
Indianapolis Division

JAMES RANDALL WILLIS, II, by his next friend and father, JAMES RANDALL WILLIS, Plaintiff,	)	
v.	)	IP 97-2038-C-T/G
ANDERSON COMMUNITY SCHOOL CORPORATION, Defendant.	)	

[Filed January 29, 1998]

ENTRY RULING ON THE MERITS OF THE COMPLAINT

On January 28, 1998, the court issued its Entry Denying Verified Motion for Preliminary Injunction. The court held therein that Mr. Willis had not shown a likelihood of success on the merits of his claim that the search conducted under the School Corporation's drug testing policy is unreasonable under all the circumstances or in violation of Indiana law.

Earlier today, the parties filed a Stipulation of the

Parties as to the Evidence and Argument and Request to Enter Judgment, in which they stipulate that all relevant facts have been presented and that all legal arguments have been made in this matter, and, they request the court to enter final judgment on the merits on the basis of the record presently before it. Therefore, the court now orders that the trial of this action on the merits be advanced. *See* FED. R. CIV. P. 65(a)(2); *see also* FED. R. Civ. P 57. On the basis of the findings of fact and conclusions of law stated in the Entry Denying Verified Motion for Preliminary Injunction, the court holds that the search of Mr. Willis conducted by the School Corporation pursuant to its drug testing policy is reasonable under all the circumstances, and, therefore, does not violate Mr. Willis' rights under the Fourth Amendment, applicable to the states by the Fourteenth Amendment. Accordingly, the court finds in favor of Defendant Anderson School Corporation and against Plaintiff, James Randall Willis, II, on the merits of his claim under 42 U.S.C. § 1983, and will **DISMISS this claim WITH PREJUDICE.**

At the outset of this case, the court had original jurisdiction pursuant to 28 U.S.C. § 1331, thus giving the court, by authority of 28 U. S.C. § 1367(a), supplemental jurisdiction over Mr. Willis' state law claims. However, with this Entry, original jurisdiction is now lacking and Mr. Willis' supplemental claims against the Anderson Community School Corporation may be properly dismissed pursuant to 28 U.S.C. § 1367(c)(3). Accordingly, the court chooses to exercise its discretion under 28 U.S.C. § 1367(c)(3), and will DISMISS WITHOUT PREJUDICE Mr. Willis' state law claims against Anderson Community School Corporation. Mr. Willis should note that he has up to thirty days from the date of this order during which they may re-file in the appropriate state forum. 28 U.S.C. § 1367(d).

A judgment will be entered consistent with the terms of this entry.

ALL OF WHICH IS ORDERED this 29th day of January 1998.

/s/_____
John Daniel Tinder, Judge
United States District Court

Copies to:

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APPENDIX D

United States District Court
Southern District of Indiana
Indianapolis Division

JAMES RANDALL WILLIS, II, by his next friend and father, JAMES RANDALL WILLIS, Plaintiff,	)	
v.	)	**IP 97-2038-C-T/G**
ANDERSON COMMUNITY SCHOOL CORPORATION, Defendant.	)	

[Filed January 29, 1998]

JUDGMENT

On January 28, 1998, the court issued its Entry Denying Verified Motion for Preliminary Injunction. On January 29, 1998, the court ordered the trial of this action on the merits advanced and issued its Entry on the Merits, finding in favor of Defendant Anderson School Community School Corporation and against Plaintiff, James Randall Willis, II, on his Fourth and Fourteenth Amendment claim brought under 42 U.S.C. § 1983.

IT IS NOW THEREFORE ORDERED

ADJUDGED AND DECREED that JUDGMENT is entered in favor of Defendant Anderson Community School Corporation and against Plaintiff James Randall Willis, II on Mr. Willis' claim under the Fourth and Fourteenth Amendments to the United States Constitution, and this claim is DISMISSED WITH PREJUDICE.

Pursuant to 28 U.S.C. § 1367(c), the court declines to exercise jurisdiction over the claims brought under the Indiana Constitution and the Indiana statute, and DISMISSES these claims WITHOUT PREJUDICE to refiling in the appropriate state forum within thirty (30) days of this date.

Each party is to bear his own costs.

ALL OF WHICH IS ORDERED this 29th day of January 1998.

/s/_____
John Daniel Tinder, Judge
United States District Court

Geraldine Crockett, Clerk
United States District Court

/s/_____
By Anne Perry, Deputy Clerk

Copies to:

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APPENDIX E

EXCERPT FROM "FACING CHEMICAL DEPENDENCY IN THE CLASSROOM"

* * *

homeostasis, equilibrium or state of balance. Each school building and each classroom within the building has developed its own feeling, tone, atmosphere, overt and covert rules and bases of power within administration, faculty and students.

When none of the students are physiologically or emotionally impaired, the system works well. Information is passed from one generation to the next in an atmosphere of trust, safety and respect. But when chemical dependency invades the system something happens. When 10 percent of the student body are toxic from the drug they used the day before, the old system begins to break down and a new homeostasis is created — a homeostasis which allows the system to function as efficiently as possible with chemical dependency present in the system. This is a little bit like learning to walk with a stone in your shoe. You can't walk with the same poise or run with the same speed but at least you can still move and besides it doesn't hurt that much if you try not to think about it.

Symptoms of Chemical Dependency in Schools

All systems respond to prolonged exposure to toxic chemicals: cells, tissue, organs, families, classes, school

systems and communities. A school system which has been impacted by chemical dependency usually shows four characteristics: increased student unmanageability, decreased student learning, increased teacher burnout and increased administrative effort.

Increased Student Unmanageability

Toxicity from intoxicating mood-altering chemicals remains in the system for several days and irritates the brain cells. A toxic student's central nervous system cannot manage itself nor can anyone else manage the moods of a toxic brain. Student unmanageability may take the forms of overt acting out, disrespect, violence, abuse or truancy or it may take a more passive form, such as drowsiness, apathy, isolation, unfinished assignments and disrespect.

Decreased Student Learning

Toxic central nervous systems cannot learn as well as nontoxic ones. The first priority for an irritated neuron is to find relief from its distress. The first priority of an irritated child is to find relief, not the academic subject being taught. Toxic brains find it hard to focus on the causes of the War of 1812 or gerund phrases. Toxic brains also tend to be disruptive and if a teacher spends five minutes per 50 minutes of a classroom period managing the unmanageable kids, the amount of education that can possibly take place has been decreased by 10 percent. That means the other kids in the class will learn 10 percent less material that day, that month, that year and this decline will be reflected in standardized test scores.

Increased Teacher Burnout

Teachers who interact with two toxic brains per class each day become tired. A teacher with five academic classes must try to manage about ten sets of irritated brains each day, not counting the toxic kids at lunch, on the playground and in the halls. Children of alcoholics, spouses of alcoholics and teachers of alcoholics become exhausted trying to control the uncontrollable and manage the unmanageable. Children, spouses and teachers of alcoholic/chemical dependents suffer a predictable emotional response to living or working with an irritated toxic brain.

Increased Administrative Effort

Administrators spend much of their time trying to manage the chemically dependent student and the children of alcoholics who are acting out their emotional

* * *

APPENDIX F

CRITERIA FOR DRUG SCREENS

SEE FOLLOWING PAGE

CRITERIA FOR DRUG SCREENS

	suspicion	smoking	theft	possession	fights	profanity/teacher	truancy	extortion	under influence	intimidation	missed SSD	insubordination	TOTALS
Students with Positive Results	2-6%				3-9%	4-11%	10-29%	1-3%	4-11%		7-20%	4-11%	35
Students with Negative Results	2-2%	2-2%	7-7%	2-2%	14-13%	9-9%	29-28%			1-1%	31-30%	8-8%	105
Students with Pending Results				1-17%			1-17%				3-50%	1-17%	6
Students with Inconclusive Results											1-100%		1
TOTALS	4-3%	2-1%	7-5%	3-2%	17-12%	13-9%	40-27%	1-.6%	4-3%	1-.6%	42-29%	13-9%	147

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Supreme Court, U.S.
FILED
FEB 16 1999
CLERK

No. 98-1183

In The

Supreme Court of the United States

October Term, 1998

ANDERSON COMMUNITY SCHOOL CORPORATION,

Petitioner,

v.

JAMES RANDALL WILLIS, II, BY HIS NEXT FRIEND AND FATHER, JAMES RANDALL WILLIS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

KENNETH J. FALK
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1788

QUESTION PRESENTED

Does the Anderson Community School Corporation's drug testing policy which requires that all students suspended from school for any reason for three days or more take a urine test to screen for drug or alcohol use before they may be readmitted to school violate the Fourth Amendment to the United States Constitution as applied to respondent, who was not suspended for drug related activity and who, immediately after the activity which gave rise to the suspension, was examined by his Dean of Students who concluded that there was not reasonable suspicion to believe that respondent was under the influence of drugs or alcohol?

LIST OF PARTIES

Petitioner is Anderson Community School Corporation and Respondent is James Randall Willis, II, by his next friend and father, James Randall Willis.[1]

Petitioner has no parent companies, subsidiaries, or affiliates.

---

[1] The petition of the school corporation notes that Mr. Willis and his son are respondents. In fact this action was brought only by James Randall Willis, II, by his next friend and father. There is therefore only one respondent.

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STATEMENT OF THE CASE

In December of 1997, respondent James Randall Willis, II, (hereinafter "Mr. Willis"), was a freshman at Anderson High School. He and another student engaged in a fight which resulted in both students being suspended for five (5) days for fighting. During the fight Mr. Willis verbally abused the other student, threw something at him, and punched him four to five times.

Immediately after the fight Mr. Willis and the other combatant were taken to the Dean of Students. The Dean observed Mr. Willis. The Dean noted nothing which gave him reasonable suspicion to believe that Mr. Willis was impaired or under the influence of drugs or alcohol. Nevertheless, Mr. Willis was not allowed to return to school following his five day suspension unless, and until, he submitted to a drug test through urinalysis. Upon his repeated refusals to take the test he was suspended again and was eventually suspended pending expulsion proceedings.

The basis for the drug test requirement is the drug testing policy of the Anderson Community School Corporation (hereinafter "ACSC") which the Seventh Circuit found to be a violation of the Fourth Amendment. The policy requires that any student suspended for any reason for three days or more must take a drug test before he or she is allowed into school. (The policy is attached as Appendix). (App. 1). Additionally, the policy provides that students who violate ACSC's tobacco policy, who are habitually truant, who demonstrate reasonable individualized suspicion, or who exhibit behaviors which lead the

school to suspect that the individual is under the influence of drugs, must also be tested. (App. 2).

The policy notes that it is targeting behaviors which "are not conclusive on their own that a student is using drugs, . . . [but] they are indicators that point to that possibility." (App. 1). In formulating the policy ACSC used professional literature which indicates that students under the influence of drugs and alcohol may exhibit a potentially endless list of behaviors, including defying rules and regulations. *Willis v. Anderson Community School Corp.*, 158 F.3d 415, 419 (7th Cir. 1998). Accordingly, the literature cautions that many of the potential indicators of adolescent drug use are normal behaviors in many adolescents and therefore what is most revealing in terms of potential drug use is clustering of behaviors, changes from the norm, and frequency of occurrence. *Id.*

Of the four freshman suspended for fighting at Mr. Willis' high school who have been tested under the policy, none tested positive. Altogether, in both of the high schools operated by ACSC 17% of freshman (12 out of 71) suspended for any reason were found to have tested positive. In both high schools 29% (85 of 291) of all the students tested after suspensions tested positive. This is slightly higher than the 26% (7 out of 27) of the students who tested positive in all high school grades after suspensions for fighting.

ARGUMENT

Reason for Denying the Writ

Plenary review in this case is inappropriate because the Court of Appeals correctly applied settled law from this Court in finding that the drug testing policy violated the Fourth Amendment. Although the petitioner urges that the Seventh Circuit decision conflicts in principle with both *Vernonia School District 47 J v. Acton*, 515 U.S. 646 (1995) and *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), the decision of the Court of Appeals is entirely consistent with both of those opinions. The petitioner merely seeks to correct what it deems to be a misapplication of a properly stated rule of law. This does not afford a reason for granting the petition. The petitioner also urges this Court to expand its *Vernonia* holding. However, this case is unique. There is not a conflict among the circuits. There are apparently no similar lower court decisions even in the district courts. The Court of Appeals' decision does not violate any holding of this Court and the expansion requested by petitioner would violate the principles established in *Vernonia*. The petition fails to demonstrate any of the usual reasons that this Court deems to be necessary in order to grant a writ of certiorari.

A. The Seventh Circuit decision in this case does not conflict with *Vernonia* and it correctly applied the fact-based test present in that case to reach the proper conclusion that application of the policy violated Mr. Willis' constitutional rights

In *Vernonia* this Court approved of random, suspicionless, urine tests of high school athletes only after undertaking a fact-based balancing test which considered

the privacy interests of the students, the character of the intrusion, and the nature of the governmental concern and whether the means chosen are efficacious in meeting this concern. 515 U.S. at 654, 658, 660. The Seventh Circuit in this case recognized that this was the test set out by this Court. *Willis*, 158 F.3d at 421. However, ACSC disagrees with the result reached by the Court upon application of this fact-bound test. Even if the result reached by the Court of Appeals was incorrect, which it was not, error in applying the *Vernonia* test does not afford grounds for review since, at most, ACSC is complaining of "the misapplication of a properly stated rule of law." Supreme Court Rule 10.

ACSC disagrees with the Seventh Circuit's conclusion that Mr. Willis' privacy interest in not wanting to take a drug test in order to resume his compulsory education, *Ind. Code* 20-8.1-3-17, is greater than a high school athlete's interest in taking part in a voluntary extracurricular activity. It is true that both Mr. Willis and student-athletes are students and that for both the school has an interest as "guardian and tutor of children entrusted to its care." *Vernonia*, 515 U.S. at 665. However, the Seventh Circuit correctly noted that this Court in *Vernonia* recognized a number of ways that the privacy interests of student-athletes are diminished to a greater degree than other students. Athletes are used to, and should expect, the general lack of privacy associated with communal undress and the extensive regulation of their athletic endeavors. *Vernonia*, 515 U.S. at 656-57. Mr. Willis, who has not surrendered any of his privacy since he is not engaging in athletics, therefore has a much greater privacy interest than would an athlete.

This Court in *Vernonia* also noted that the privacy interests of the athletes were diminished because they had voluntarily chosen to engage in this activity. *Vernonia*, 515 U.S. at 657. Unlike student-athletes who can avoid the drug test by not participating in athletic endeavors, having engaged in a fight Mr. Willis could not avoid testing. And, as the Seventh Circuit correctly noted, any argument that getting into a fight is voluntary in the same manner as participating in athletics is "strained." *Willis*, 158 F.3d at 422. The reality is that 15 year old youth sometimes act foolishly and impetuously and the Court of Appeals recognized that this immaturity does not equate to the voluntariness found in *Vernonia*. Moreover, as conceded by ACSC at oral argument, the policy would be applied to someone who fights back in an altercation. "Certainly the decision to return a punch – often made in less time than it takes the aggressor to deliver the second blow – cannot be analogized to the sort of measured conduct or degree of control discussed in Vernonia." 158 F.3d at 422.

The privacy interest of Mr. Willis is therefore greater than that of the student-athletes in *Vernonia*. Contrary to the arguments of ACSC in its petition the Seventh Circuit did not err in giving more weight to Mr. Willis' privacy interests.

There is, as recognized by the Court of Appeals, also a distinct difference in the efficacy of the policy in *Vernonia* and that present here. In determining that a random drug testing procedure was constitutional this Court in *Vernonia* noted that a system which required tests to be justified by individualized cause would be extremely difficult, if not impossible. 515 U.S. at 663. There are not

similar impediments to a cause based system here. As noted by the Court of Appeals, before a student may be suspended Indiana law requires that he must meet with a school official, unless the student's misconduct requires immediate removal of the student, in which case the meeting must take place as soon as is reasonably possible. *Ind. Code* 20-8.1-5.1-12. Indeed, Mr. Willis met with the Dean of Students who concluded after observing the student that there was nothing which gave the Dean reasonable suspicion to believe that Mr. Willis was under the influence. This mandated requirement of physical observation did not exist in either *Vernonia* or in any of the other "special needs" cases allowing random drug tests. *National Treasury Employees v. Von Raab*, 489 U.S. 656 (1989); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989). Indeed, these latter cases emphasized the fact that it was impractical to require individualized testing of the workers involved because it was often impossible to subject the persons to be tested to any degree of scrutiny. *See Von Raab*, 489 U.S. at 674; *Skinner*, 489 U.S. at 631. The Court of Appeals recognized that this case presented a different scenario, one where it was feasible to subject students to "the kind of day-to-day scrutiny that is the norm in more traditional office environments." *Von Raab*, 489 U.S. at 674.

ACSC disagrees with this conclusion, and argues that because toxicity from drugs may remain in the student's system for several days that a student, although brought before the Dean of Students, may not appear to be under the influence, thus making infeasible a system based on reasonable suspicion. However, the Dean of Students had available to him not only the physical presence of Mr.

Willis before him, but the ability to consult with teachers as to the student's behavior and appearance in the preceding days. All of this other potential evidence, specific to Mr. Willis, could of course be used to find cause to test him if the evidence had existed. *See e.g, Cornfield by Lewis v. School District No. 230*, 991 F.2d 1316 (7th Cir. 1993) (Erratic behavior of student, by itself, did not justify drug test. However, the test was justified by statements made by other students in the past and statements made by the student himself). As the Seventh Circuit noted, "[i]t is hard to believe that Deans of Students would have any difficulty justifying a finding of reasonable suspicion in fighting cases." *Willis*, 158 F.3d at 424. Nevertheless, the Dean in Mr. Willis' case concluded that there was not reasonable suspicion.[2]

The Court of Appeals engaged in the fact-based analysis and balancing required by *Vernonia*. It correctly noted the differences between a system designed to randomly test student-athletes and a system designed to test

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[2] ACSC argues that 89% of all students who tested positive did not exhibit signs of being impaired. (Petition of ACSC, p. 20, note 8). The underlying data which ACSC has used to generate this statistic does not measure the difficulty that school officials have in assessing if a student is impaired or the frequency that students exhibit signs of being impaired. The statistic only measures the frequency that administrators chose to suspend individuals for being under the influence, as opposed to other reasons. Given the fact that a drug test is required for other disciplinary behaviors, one can surmise from this statistic that school administrators find it easier to discipline for these other offenses rather than for being under the influence which may require a marshaling of evidence of prior behavior as well as the behavior giving rise to the suspension itself.

students who had engaged in negative behaviors and who were attempting to return to school following suspensions. The analysis engaged in by the Seventh Circuit conforms to that in *Vernonia*. It correctly found that "the balance of our 'context-specific inquiry' tips in favor of Willis." 158 F.3d at 425.

B. The decision does not violate the principle of *New Jersey v. T.L.O.* since the facts disclose that there was not reasonable suspicion present

The Seventh Circuit found that there was not reasonable suspicion justifying the drug testing of Mr. Willis. Again, ACSC disagrees with this determination based on the circumstances of this case. However, it is clear that the Court of Appeals correctly enunciated the reasonable suspicion standard determined by *T.L.O.* As with the issue above, ACSC is merely complaining that the Court of Appeals misapplied a properly stated principle of law. This does not create cause for granting ACSC's petition. Supreme Court Rule 10. Moreover, it is clear that the Court of Appeals' conclusion is correct.

ACSC has constructed a convoluted argument that Mr. Willis' one act of fighting gave rise to reasonable suspicion of drug use despite the fact that the Dean of Students, whose job it is to observe students prior to suspension, indicated that he saw no evidence of reasonable suspicion. Moreover, the ACSC policy itself recognizes that reasonable suspicion can exist to justify a drug test (App. 2), but Mr. Willis was informed that he had to take the test, not because reasonable suspicion existed,

but because of the policy. Nevertheless now, after the fact, ACSC argues that there was reasonable suspicion.

There is no doubt that there is a potential relationship between drug use and bad student behavior. However, it is also clear from the statistics of ACSC that most students who engage in behavior which result in suspensions are not under the influence of drugs or alcohol. It is also clear from the professional literature that the behavior which is most indicative of possible drug use is a clustering of negative behaviors. Mr. Willis was in one fight. There was no clustering.

At the time that he was disciplined, ACSC had ample opportunity to observe Mr. Willis and to conclude that there was reasonable suspicion that he was using drugs. The observation was made, and the conclusion was that there was not reasonable suspicion. *T.L.O.* requires that there must be "reasonable grounds for suspecting that the search will turn up evidence that" Mr. Willis was under the influence. 469 U.S. at 341-42. The Court of Appeals recognized that this one act of fighting did not create this suspicion. *T.L.O* was not violated either in principle or in any other manner.

C. This case does not present the opportunity to extend the holding of *Vernonia*

Curiously, although ACSC begins its petition by arguing that the Court of Appeals' decision in some way violated Supreme Court precedent, it concludes its petition by arguing that this case presents an opportunity to expand *Vernonia*. This expansion argument is made even though this case appears to be unique in the United

States. There is no conflict among the circuits, there is no conflict with decisions of this Court, there are apparently no other lower court decisions considering this issue. Petitioner does not argue to the contrary. Given this, it would be inappropriate to use this case as a vehicle for the expansion of any holding.

Moreover, as indicated above, ACSC is not seeking to expand *Vernonia*, it is seeking to have this Court ignore *Vernonia*. *Vernonia* set out a careful fact-based balancing test which the Court of Appeals observed. It is clear from *Vernonia* that the potential risk of harm from drugs is not, in and of itself, sufficient to overcome the privacy interests of all students, even those who have not taken the voluntary step of engaging in high school athletics. This is especially true where here, as opposed to the situation in *Vernonia*, school administrators are present to assess whether the student's behavior and other factors create sufficient cause to justify a drug test under *T.L.O.* This Court has, through *T.L.O.* and *Vernonia* established the parameters in this area. There is no need to expand these boundaries.

CONCLUSION

Certiorari is not warranted. The Seventh Circuit correctly applied both *Vernonia* and *T.L.O.* ACSC seeks to challenge this settled law and the results which the Seventh Circuit reached through its application. There are

not grounds for granting the petition and for the foregoing reasons it should be denied.

Respectfully submitted,

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APPENDIX

Policy 5512

STUDENTS

SECONDARY

Drug Testing

Research on adolescent substance abuse indicates a general consensus regarding the fact that certain behaviors can help identify those adolescents who are using alcohol or other drugs on a regular basis. Those behaviors include areas that can be easily identified in a school setting such as truancy and tardiness, verbal and physical abuse towards staff or classmates, vandalism, absenteeism, and a sudden drop in grades. These behaviors are not conclusive on their own that a student is using drugs, but they are indicators that point to that possibility.

The purpose of this drug testing policy is to help identify and intervene with those students who are using drugs as soon as possible and to involve the parents immediately. When students commit a disciplinary infraction which results in suspension from school for three (3) days or more, they will be required to submit to a drug test. The results of the test are for parental use only and will not result in any additional punishment by school officials. It will then be up to the parents with the help provided by the designated school official to seek the best treatment for the individual student.

Policy Adopted: August 5, 1997

Rule 5512

STUDENTS

SECONDARY

Drug Testing

Because tobacco use, involvements in fights, and continuous negative behaviors often indicate potential drug use, any student who commits any of the following acts must submit to a drug test administered under school supervision:

1. Violates the school's tobacco policy (possessing and/or using tobacco products).
2. Is suspended from school for three (3) or more days for fighting.
3. Violates any other school rule that results in the student being suspended from school for three (3) or more days.
4. Habitual truancy.
5. Reasonable individualized suspicion.
6. In addition, the school may require a student to submit to a test for drugs and alcohol, if a student exhibits behaviors which lead school authorities to suspect the student is under the influence of a controlled substance. Further, the school may subject items in such student's possession to tests to decide if those items contain drugs or alcohol. Any student found to be under the influence or in possession of alcohol or other drugs will be dealt with according to the student discipline policy.

The results of the drug test will be provided to the designated school official who will always share the

results with the parents. If the results are positive, the designated school official will proceed as follows:

I. **FIRST POSITIVE TEST** – The results of the test will only be provided to the parent(s) or guardian(s) and the principal/designee. The designated school official will work with the parents to provide evaluation and/or treatment as indicated.

II. **SECOND POSITIVE TEST** – The results of the test will only be provided to the parent(s) or guardian(s) and the principal/designee. The designated school official will work with the parents to provide evaluation and/or treatment as indicated.

III. **THIRD POSITIVE TEST** – The parents will be required to pay for the drug test and the results of the test will be provided to both the parents and the principal/designee. The designated school official will work with the parents to provide evaluation and/or treatment as indicated.

Anderson Community Schools officials will provide information regarding school approved drug education programs in which the student must participate. Refusal to participate in such a program may result in expulsion from school.

Refusal to submit to a drug alcohol test will be considered an admission of being under the influence of alcohol or other drugs. This is a violation of school rules and will be dealt with according to the student discipline policy. The administration/designee shall develop procedures to carry out this policy.

Anderson Community Schools will assume the cost of only the initial drug screen on the first and second

offenses at a corporation approved site. A parent/guardian may request a confirmation screening from the sample taken. However, this fee will be incurred by the parent/guardian.

Supreme Court, U.S.
FILED
FEB 26 1999
CLERK

(3)

NO. 98-1183

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1998

ANDERSON COMMUNITY SCHOOL CORPORATION,
Petitioner,

v.

JAMES RANDALL WILLIS, II, by his next friend and father
JAMES RANDALL WILLIS,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE PENN-HARRIS-MADISON SCHOOL CORPORATION AND THE INDIANA SCHOOL BOARDS ASSOCIATION AS AMICI CURIAE SUPPORTING CERTIORARI

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QUESTIONS PRESENTED

Can Anderson Community School Corporation administer drug tests to high school students who violate certain published rules, if professional literature and statistical data suggests that these violations bear a causal nexus to drug and alcohol use, consistent with the Fourth Amendment to the United States Constitution?

West Virginia Board of Education v. Barnette,
319 U.S. 624 (1943) 15

Miscellaneous

Bursch, J., *The 4 R's of Drug Testing in Public Schools: Random is Reasonable and Rights are Reduced*,
80 Minn.L.Rev. 1221, 1253 (May, 1996) 9, 16

Flatt-Moore, N., *Public Schools and Urinalysis: Assessing the Validity of Indiana Public Schools' Student Drug Testing Policies after Vernonia*, 1998 B.Y.U. Educ. & L.J. 239
(Spring, 1998) 14

Gibeaut, J., *Indiana Schools Push for Expansion of Drug Test Ruling*, 84-May A.B.A. J. 42 (May 1998) 14

Joubert D., *Message in a Bottle: The United States Supreme Court Decision in Vernonia School District 47J v. Acton*, 56
La.L.Rev. 959, 977 (1996)(Citations omitted) 10

National Indicator #20, National Education Goals Panel
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Rosenberg, I., *Public School Drug Testing: The Impact of Acton*,
33 Am.Crim.L.Rev. 349, 360 (Winter, 1996) 9

Stefkovich J., *Drug Testing of Students in Public Schools: Implications of Vernonia School District v. Acton for other Types of School-Related Drug Searches*, 113 Ed.Law Rep. 521, 538 (Dec. 12, 1996) 9

Traband, R., *The Acton Case: The Supreme Court's Gradual Sacrifice of Privacy Rights on the Altar of the War on Drugs*, 100 Dock.L.Rev. 1, 24-24 n 122 (Fall, 1995)(collecting studies) 9

U.S. Department of Justice, Bureau of Justice Statistics, School Crime Supplement to the National Crime Victimization Survey, Spring 1989 and 1995 6

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INTEREST OF THE AMICI CURIAE[1]

The Indiana School Boards Association ("ISBA"), established

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[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court of the United States, this brief was authored by Thomas E. Wheeler, II and Lisa F. Tanselle. No counsel for any party was involved in the authoring of the brief and expenses related to the preparation of the brief were borne solely by the Amici. Both parties have consented in writing to the filing of this brief pursuant to Rule 37.2(a) and the consent has been filed with the Clerk's office.

in 1949, is a nonprofit association organized to assist local school boards in the state in their respective governance roles through education, information, services and legislative advocacy, ensuring the opportunity for the highest quality public education for all children. The ISBA represents all 1663 school board members who govern the 290 public school corporations in the State of Indiana.

The ISBA strongly believes in the deterrence of drug use in schools and in local control. The interest of the ISBA is in ensuring that local school boards have the ability to enact those policies they deem necessary to discourage student drug use and thereby reduce the number of discipline problems related to drug use that occur in the public schools of our state.

The Penn-Harris-Madison School Corporation ("PHM") provides educational and related services to approximately 9,600 students in north central Indiana. Based upon this Court's decision in *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995), PHM developed a drug testing policy that provides for the random testing of students involved in extra-curricular activities, students who drive to school, and students who are suspended or expelled from school. PHM is currently the subject of a lawsuit challenging all three facets of its drug testing policy, *Joy v. Penn-Harris-Madison School Corporation*, Cause No. 3:98CV0603 AS (N.D.Ind. 1999).

PHM, like many school corporations throughout the United States, is faced with combating increased student drug use. Student education programs have proven largely unsuccessful in combating increasing levels of student drug use, particularly at the younger grades (6^{th} and 7^{th}). PHM desires to comply with the Fourth Amendment's requirements while at the same time providing the students entrusted to its care with a safe and conducive learning environment. PHM and

other schools throughout the United States have a direct interest in seeking the resolution of the issues left undecided in the *Vernonia* decision.

STATEMENT

This case concerns the proper balance between the ability of schools to provide a safe and conducive learning environment for the children entrusted to their care, and the respect for those children's constitutional rights. Specifically, the case presents the issue of whether the constitution permits random drug testing of students outside the extra-curricular context permitted in *Vernonia*.

REASONS FOR GRANTING THE PETITION

This case is "certworthy" for three reasons: (1) the question presented involves the single most important function of state and local governments, educating the Nation's children in a safe and conducive learning environment; (2) there is a tremendous amount of confusion in the Nation's schools and courts over the scope and application of the *Vernonia* decision leading to flawed policies and expensive litigation; and (3) this case presents the Court with the opportunity to decide the issue arguably "reserved" in *Vernonia* and develop a bright-line test for drug-testing in the Nation's schools. The Amici join in the Cert Petition and the reasons set forth therein relating to specific flaws in the Seventh Circuit's decision. The Amici write separately to highlight the need for the Court to clarify its holding in *Vernonia* and develop a comprehensive nationwide framework.

I. ENSURING A SAFE AND CONDUCIVE LEARNING ENVIRONMENT IS THE CORE FUNCTION OF THE NATION'S SCHOOLS.

The public schools' responsibilities are no longer merely to teach reading, writing, and arithmetic. Schools are now required to provide instruction in subjects such as health education, sex education, and morality. In addition to this nontraditional classroom instruction, schools are also being asked to shoulder the burden of feeding students breakfast and lunch, offering before and after school child care services, providing medical services such as vaccinations, testing for vision and hearing problems, and more intrusive medical care,[2] and developing student counseling and student assistance programs.

But public schools' responsibilities don't end there. The changing role of the Nation's schools is a reflection of changes in our society in general. As the social structure is shattered by the plagues of drugs and violence, so too are the schools and the educational environment. It is within this context that schools are being asked to take steps to ensure that the environment within their buildings is one that is safe and conducive to learning. Teachers are no longer concerned about students chewing gum in the classrooms or shooting spitwads. They must now be concerned with children smoking crack and shooting high powered rifles.

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[2] Not only are schools being required to assume all of the traditional roles of parents, they are also required to assume the role of physician as well. For example, in *Cedar Rapids Community School District v. Garrett F.*, 106 F.3d 822 (8th Cir. 1997) *cert. granted* 118 S.Ct. 1793 (U.S. 1998), a school was required to provide continuous nursing care to a quadriplegic student.

The expectations that many have of the public schools are reflected in the National Education Goals.[3] Two of the goals are particularly relevant in this case: Goal 1: By the year 2000, all children will start school ready to learn; and Goal 7: By the year 2000, every school in the United States will be free of drugs, violence, and the unauthorized presence of firearms and alcohol and will offer a disciplined environment conducive to learning. One of the stated objectives of Goal 1 is that "[c]hildren will receive the nutrition, physical education activities, and health care needed to arrive at school with healthy minds and bodies, and to maintain the mental alertness necessary to be prepared to learn ... ." An objective of Goal 7 is that "[e]very school will implement a firm and fair policy on the use, possession, and distribution of drugs and alcohol."

To ensure that the school environment is one that is safe, where a student can focus on classroom instruction, school boards have been forced to go beyond the establishment of discipline rules intended to regulate student behavior in the classroom and have adopted policies prohibiting conduct such as sexual harassment, racial harassment, and bringing weapons to school.

A significant element in providing a safe and effective learning environment is the elimination of drugs and violence on school property and the deterrence of drug use among the student population. One of the most troubling problems public schools have had to contend with in recent years has been the increase in the availability of drugs at school, the use of drugs by students, and the number of violent acts committed at school. According to a recent survey, *Students' Report*

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of School Crime: 1989 and 1995,[4] 65.3% of students aged 12 through 19 reported that drugs were available at school. That same survey noted that 14.6% of the student population reported they had been victimized at school. Several other studies have tracked illicit drug use by students in grades eight through 12 and have concluded that drug use by students continues to be a problem. The *1998 National Education Goals Panel Report* showed that the percentage of 10th graders using illicit drugs in 1997 was 40%, up from 24% in 1991.[5] The University of Michigan reported that 54.3% of the Nation's high school seniors had used an illicit drug by the time they reached their senior year of high school.[6]

Drug use effects a student's mind and body. This Court has already recognized that "[s]chool years are the time when the physical, psychological, and addictive effects of drugs are most severe." *Vernonia*, 515 U.S. at 661. Additionally, studies also show that some discipline problems in school, such as fighting, truancy, and vandalism, correlate with student use of alcohol and other drugs.[7] This correlation was evident in *Vernonia* where administrators and teachers reported in 1988 and 1989, a direct correlation between rising drug use and the number of disciplinary referrals, which had doubled since the early 1980's. *Vernonia*, 515 U.S. at 648-649. Finally, students impaired by drugs not only affect their own learning but disrupt the learning of others and the overall educational environment. This Court has noted

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[4] U.S. Department of Justice, Bureau of Justice Statistics, School Crime Supplement to the National Crime Victimization Survey, Spring 1989 and 1995.

[5] National Indicator #20, National Education Goals Panel Report, 1998.

[6] *Monitoring the Future Study*, December 18, 1999.

[7] *See e.g. Bowman, B., Aggressive and Violent Students; Statistics on Violence, Developmental Resources, Inc. (1994).*

that the effects of a drug-infested school "are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted." *Vernonia*, 515 U.S. at 661.

While schools have taught health education for many years and have been given federal dollars for drug education programming, studies indicate that classroom instruction is simply not enough. Even the district court in *Vernonia* noted that "[s]imply telling [students] that drug use is bad for their health and that they should stop using is invariably ineffective." *Acton v. Vernonia School District 47J*, 796 F.Supp. 1354, 1357 (D.Or. 1992). As a consequence many school boards have had to turn to other methods of curbing drug use. One of the most effective methods is the deterrent effect of random drug-testing. Drug-testing policies have been designed to identify and help students who are using drugs and to protect other students from the disruption and dangers posed by students using illegal drugs. They are not designed to be punitive. If a student tests positive the student is not disciplined or punished academically, instead the student and the student's parent are offered help, such as a student assistance program or a drug rehabilitation program. School boards have undertaken this responsibility in "furtherance of their roles as guardian and tutor of children entrusted to [their] care." *Vernonia*, 515 U.S. at 664.

The policy adopted by the Anderson school board is one that is designed to help students who use drugs and to protect other students who attend classes with drug-users. Students who disrupt the educational environment by fighting, being truant, or violating any other school rule that results in the student being suspended for at least three days, are those who are tested and offered assistance if the test is positive. This is precisely the type of drug-testing policy that Justice

O'Conner in her dissent in the *Vernonia* case opined would be a more reasonable program than the testing of athletes.[8]

Schools are in the business of educating students. But students must come to school "ready to learn" and not impaired by the use of drugs. Moreover, impaired students should not be permitted to disrupt the educational environment. In order to have "schools [that are] free from drugs, violence, and ... alcohol and [that] will offer a disciplined environment conducive to learning," school boards must be given the tools necessary to combat this problem. One of the most effective deterrent tools has been random drug testing.

II. THE ISSUE RESERVED IN VERNONIA HAS CREATED CONFUSION AMONG STUDENTS, COURTS AND SCHOOLS.

Far from stilling the school drug testing debate, the halting steps in this Court's decision in *Vernonia* simply fanned the fire of this debate with cautionary notes and arguably reserved issues.

A. The Reserved Issue

In its ruling approving the school's policy of randomly drug testing student athletes, the majority in *Vernonia* issued the following warning: "We caution against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts." *Id.*, 525 U.S. at 664. The key phrase in this sentence is "other contexts."

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[8] Specifically, Justice O'Connor stated "it seems to me that the far more reasonable choice would have been to focus on the class of students found to have violated published school rules against severe disruption in class and around campus ... disruption that had a strong nexus to drug use, as the District established at trial." *Vernonia*, 515 U.S. at 685.

Some commentators have taken this to mean that the majority would look with disfavor on any testing in the school context beyond that of student athletes. *See e.g.* Stefkovich J., *Drug Testing of Students in Public Schools: Implications of Vernonia School District v. Acton for other Types of School-Related Drug Searches*, 113 Ed.Law Rep. 521, 538 (Dec. 12, 1996). Other commentators have taken the opposite position, arguing that *Vernonia* permits the blanket testing of all students. *See e.g.* Bursch, J. *The 4 R's of Drug Testing in Public Schools: Random is Reasonable and Rights are Reduced*, 80 Minn.L.Rev. 1221, 1253 (May, 1996) and Rosenberg, I. *Public School Drug Testing: The Impact of Acton*, 33 Am.Crim.L.Rev. 349, 360 (Winter, 1996). The latter conclusion is based on the sentence in the majority opinion in *Vernonia* immediately following the cautionary note which provides that "[t]he most significant element in this case is the first we discussed: that the Policy was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care." *Vernonia*, 515 U.S. at 664. Thus it is argued that the second sentence qualifies the cautionary note and the two taken together support generalized testing of all students, not just those involved in extracurricular athletics.[9] Presumably it was this ambiguity that led Justice Ginsburg in concurrence to say that: "I comprehend the Court's opinion as reserving the question whether the District, on no more than the showing here, constitutionally could impose routine drug testing not only on those seeking to engage with others in team sports, but on all

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[9] In fact NCAA testing of college athletes reveals that drug use by student athletes is actually far less than that of the general school population. *See* Traband, R., *The Acton Case: The Supreme Court's Gradual Sacrifice of Privacy Rights on the Altar of the War on Drugs*, 100 Dock.L.Rev. 1, 24-24 n 122 (Fall, 1995)(collecting studies).

students required to attend school." *Vernonia*, 515 U.S. at 666 (Ginsburg, J. concurring).[10]

As a consequence of this give and take the *Vernonia* decision presents more questions than it answers. As noted by one commentator:

> The most important question is whether the holding will be read narrowly, applying to the specific facts of the case, or whether the holding will be extended to the drug testing of all student participants in extracurricular activities or even an entire student population. The majority, perhaps anticipating this question, stated: "We caution against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts. This "answer" is vague. What other contexts? Does this holding apply to other extracurricular activities? If so, does it apply to other extracurricular activities that do not ordinarily require their participants to undress in each others presence? Does it apply to all public school students? Is it necessary to find that the particular group of students to be tested is known to use drugs? Or, can a court simply note that drugs are a national problem?

Joubert D., *Message in a Bottle: The United States Supreme Court Decision in Vernonia School District 47J v. Acton*, 56 La.L.Rev. 959, 977 (1996)(Citations omitted).

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[10] The fact that the other six members of the majority declined to join in Justice Ginsburg's concurrence would seem to indicate that her concern about the reserved issue was not one the other members of this Court shared.

B. Conflicting Opinions on the Reserved Issue

As a result of the "reserved" issue, the lower courts have come into conflict in their application of Vernonia. Schools with significant drug problems have been forced to simply take their chances in crafting drug testing policies and have all too frequently been sued for their efforts. This conflicting authority can be seen when *Todd v. Rush County Schools*, 133 F.3d 984, *reh'g. en banc, denied*, 139 F.3d 571 (7th Cir.) *cert. denied*, 142 L.Ed.2d 53 (1998) is compared with *Trinidad School District No. 1 v. Lopez*, 963 P.2d 1095 (Col. 1998). In *Todd* the Seventh Circuit expanded *Vernonia* by holding that a drug testing policy which applied to students involved in non-athletic extracurricular activities was valid. The Court did so noting that "[w]e conclude that Rush County Schools' drug testing program is sufficiently similar to the programs in *Vernonia* and *Schaill* to pass muster under the Fourth and Fourteenth Amendments." *Todd*, 133 F.3d at 986-987. In contrast, the Colorado Supreme Court in *Trinidad* found unconstitutional a drug testing policy which "included all students participating in all extracurricular activities." *Id.*, 963 P.2d at 1109. The court noted that "[t]here is no evidence in the record to suggest that marching band members are like 'school athletes, where the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high.' Indeed, the band director testified that during his twenty-three years as the band director, there had never been a drug-related injury to a student participating in the marching band." *Id.*, *citing Vernonia*, 515 U.S. at 662. Thus there is a clear conflict between the Seventh Circuit and the Colorado Supreme Court on the reserved issue in *Vernonia*.

C. The Co-Curricular Issue and Testing of all Students.

The *Trinidad* and *Todd* cases also illustrate the problems that *Vernonia* presents with respect to "co-curricular" student activities, i.e. those activities that involve student participation outside regular class hours, that are related to a specific class, and are required in order for an enrolled student to receive a grade or credit. As noted by Justice Scott in his dissenting opinion in *Trinidad*:

> For privacy reasons I see no reason to distinguish between a voluntary extracurricular activity and an elective co-curricular activity. In both situations, participation is optional, i.e. students are not required to play in marching band in order to graduate any more than they are required to play on the football team. If the Trinidad schools gave physical education credit to members of the football team, the invasion of privacy resulting from mandatory drug testing would be no different, and the validity of the testing program as applied to athletes would not change. I simply cannot see any principled basis for drawing the line between co-curricular activities on the one hand and entirely extracurricular activities on the other.

Trinidad, 963 P.2d at 1115.

Justice Scott is correct, there is no logical reason to limit *Vernonia* to students who participate in extracurricular athletics. In fact there is no logical reason to limit it at all in the school context. When such a suggestion is presented the immediate response is a cry of fascism and the dangers of uncontrolled governmental intrusions into

individual liberties. However, these concerns ignore the very important limitation on **any** drug testing in the schools (extracurricular or otherwise), and that is that prior to the implementation of any drug testing policy the school must show "compelling"[11] and "immediate[ ] governmental concern." *Vernonia*, 515 U.S. at 660-661; *Skinner v. Railway Labor Executives' Ass'n.*, 489 U.S. 602, 668 (1989). In *Vernonia* this concern was documented by evidence that "'a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion,' that '[d]isciplinary actions had reached 'epidemic proportions,'' and that 'the rebellion was being fueled by alcohol and drug abuse as well as by the student's misperceptions about the drug culture.'" *Id.*, 515 U.S. at 662-663.

This is a significant limitation on a school's ability to implement a policy to test all students. The framework crafted by the majority in *Vernonia* creates a nice balance between the interests of the schools in eradicating drug use and the limited but acknowledged privacy interests of the students in all situations, not just extacurricular athletics. The *Willis* case presents this court with an excellent opportunity to confirm that its well reasoned analysis applies beyond the extracurricular athletic arena. Thus although a school could constitutionally randomly test all students as Justice Scalia indicated in the majority opinion in *Vernonia*, in order to do so the school would have to make a pretty compelling showing.

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[11] There is some confusion as to whether "compelling" as used in *Vernonia* means compelling in the ordinary constitution lexicon, or whether it merely means "important enough to justify the particular search at hand, in light of other factors which show the search to be relatively intrusive upon a genuine expectation of privacy." *Id.*, 515 U.S. at 661.

III. THIS COURT SHOULD RESOLVE THE "RESERVED ISSUE."

The confusion over the scope of *Vernonia* is both real and immediate. Based on the severity of the drug problem in America, the youthful age at which students are getting their first introduction to gateway (tobacco and alcohol) drugs, the lack of success of traditional educational programs, and the *Vernonia* decision, schools will (rightly or wrongly) turn to drug testing in increasing numbers as a solution to this problem. Without clear guidelines from this Court schools are as likely to get things wrong as get them right. An approach which forces schools to guess at what is constitutionally permissible is counter-productive, drains precious educational resources, and sends the wrong message to our Nation's youth.

The Indiana experience is an excellent example of this.[12] Faced with increasing student drug use, in 1987 the Tippecanoe County School Corporation adopted a policy testing student athletes. The Indiana Civil Liberties Union ("ICLU") challenged that policy which resulted in a bench trial and an appeal to the Seventh Circuit. The Seventh Circuit affirmed the policy in a pre-*Vernonia* decision, *Schaill v. Tippecanoe County School Corporation*, 864 F.2d 1309 (7th Cir. 1988). Following the *Vernonia* decision the Rush County School Corporation adopted a policy that mandated testing of all students involved in extracurricular activities both athletic and non-athletic. Again litigation by the ICLU ensued and once again the Seventh Circuit approved the program. *Todd, supra.*

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[12] For some reason Indiana has been at the forefront of student drug-testing issues. *See e.g.* Gibeaut, J., *Indiana Schools Push for Expansion of Drug Test Ruling*, 84-May A.B.A. J. 42 (May 1998) and Flatt-Moore, N., *Public Schools and Urinalysis: Assessing the Validity of Indiana Public Schools' Student Drug Testing Policies after Vernonia*, 1998 B.Y.U. Educ. & L.J. 239 (Spring, 1998).

In 1997 the Anderson Community School Corporation, again faced with increasing drug and alcohol use among students and statistical correlations between drug use and student violence, adopted a policy that tested "any student who: is suspended for three or more days for fighting; is habitually truant; or violates any other school rule that results in at least a three-day suspension." *Willis*, 158 F.3d at 417. Utilizing the *Vernonia* opinion the District Court Judge noted that "[t]he court recognizes, however, that applying *Vernonia* to a nonrandom search is an extension of *Vernonia*, but it is the logical extension." (Cert Petition, Appendix "B", p. 48a) The Seventh Circuit disagreed with this logical extension of *Vernonia* and the parties are now before this Court.

This narrative shows how in Indiana alone, tremendous amounts of money have been spent on drug-testing litigation in order to try and flesh out the meaning of the ambiguous language used in *Vernonia*. This is money that would have been better spent educating the children of Indiana rather than employing lawyers.

In addition to the wasted resources that continued lower court litigation entails, the "hit and miss" method of implementing drug testing currently taking place throughout the Nation's schools and courtrooms also has a significant negative impact on students themselves. Amici are acutely aware of this Court's admonition "[t]hat [the fact that schools] are educating the young people for citizenship is reason for scrupulous protection of constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principals of our government as mere platitudes." *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 637 (1943). The problem with the "percolation" theory is that until this Courts sets clear guidelines, thousands of students such as Mr. Willis will be subjected to forms of drug testing that may later be found

to be unconstitutional. Such a regime undercuts both student respect for Constitutional freedoms and their rights as citizens as well as the Nation's schools' ability and moral authority to teach about these freedoms.

There would be significant national benefit to having a clear and concise set of guidelines from this Court on the constitutionality of drug testing beyond that rendered in *Vernonia*. *Willis* provides this Court with the opportunity to do this. It may very well be that this Court, after weighing the concerns noted in Justice O'Connors' dissent, concludes that the Seventh Circuit's voluntary contract analysis in *Willis* is the appropriate analysis to apply and that schools may not compel students who have not made such an agreement to undergo random suspicionless drug testing, thus effectively deciding the reserved issue in *Vernonia*. Or this Court may, using Justice Scalia's analysis, permit what many commentators have predicted, random drug testing of the entire student population rejecting the "voluntary contract" analysis used by the Seventh Circuit.[13] At the very least, regardless of the outcome, the resolution of the reserved issue in *Vernonia* will stop the flow of badly needed educational funds into drug-testing litigation, it will eliminate the loss of respect that students may have for their rights as citizens as they see them taken away and later restored as conflicting courts enter different decisions on this issue, and most importantly, it will let educators get on with the business of educating students, not playing policeman or lawyer in developing and implementing drug-testing policies.

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[13] *See e.g. The 4R's*, 80 Minn.L.Rev. at 1251 containing a proposed random drug testing policy covering the entire student population.

CONCLUSION

"[T]he necessity for the State to act is magnified by the fact that this evil is being visited not just upon individuals at large, but upon children for whom it has undertaken a special responsibility of care and direction." *Vernonia,* 515 U.S. at 662. Schools cannot and will not abrogate their duty to educate the students entrusted to their care in a safe and conducive learning environment. As a consequence, in their efforts to combat drug use among students, schools will continue to use drug testing as one weapon in their arsenal. Given this fact, the Amici respectfully request that this Court grant the Petition for a Writ of Certiorari and decide the issue, reserved in *Vernonia*.

Respectfully submitted,

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